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No. ___

IN THE

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The date of plan termination of a pension plan determines the benefits that participants will receive from the plan and those liabilities of the plan that the Pension Benefit Guaranty Corporation ("PBGC") must guarantee to plan participants under the Employee Retirement Income Security Act of 1974 ("ERISA"). Where PBGC and the plan administrator do not agree on the date of plan termination, section 4048(a)(4) of ERISA requires the court to establish the date of plan termination. 29 U.S.C. § 1348(a)(4). In this case, PBGC and the Plan administrator did not agree on the date of plan termination, but the Court of Appeals interpreted section 4048(a)(4) of ERISA to permit PBGC to establish the date in a manner that makes PBGC's own view of its economic interests paramount. Thus, the question presented is whether section 4048(a)(4) of ERISA, 29 U.S.C. § 1348(a)(4), requires the court to defer to the PBGC's proposed date of plan termination when PBGC and the plan administrator do not agree on the date of plan termination, or, rather, whether the court is to weigh other interests, particularly the expectations of pension plan participants, against PBGC's pronouncements of its economic interests.

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PETITION FOR A WRIT OF CERTIORARI

The United Steelworkers of America, AFL-CIO, CLC ("USWA") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered by that court in *Pension Benefit Guaranty Corporation v. United Steelworkers of America, AFL-CIO, CLC*, No. 03-4494 (6th Cir. Oct. 1, 2004).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 386 F.3d 659, and is reprinted at pages 1a-16a of the Appendix to this Petition ("Pet. App."). The judgment of the United States District Court for the Northern District of Ohio dated September 30, 2003, from which appeal was taken, and the district court's opinion of September 30, 2003, reported at 287 F. Supp. 2d 815, is reprinted at Pet. App. 17a-46a.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 4022, 4042 and 4048 of ERISA, 29 U.S.C. §§ 1322, 1342, 1348. These statutory provisions are set forth at Pet. App. 47a-51a.

STATEMENT OF THE CASE

Statutory Background

Title IV of ERISA establishes a mandatory federal insurance program for traditional "defined benefit" pension plans. ERISA §§ 4001-4071, 29 U.S.C. §§ 1301-1371. A defined benefit pension plan provides a retirement benefit based on a formula specified in the plan. ERISA § 3(35), 29 U.S.C. § 1002(35). The normal form of benefit under a defined benefit plan typically is an annuity that continues for the life of the participant and the participant's spouse. Thus, the value of a defined benefit plan is that it promises participants a specified benefit upon the occurrence of certain events—a predictable, secure pension for life.

Benefits under a defined benefit plan generally are based on a participant's age, salary, and years of service, and benefits accrue ratably as the participant's salary and years of service increase. Some benefits, however, are based on contingent events, such as a plant shutdown. Shutdown benefits permit a participant to begin receiving his or her full pension benefit before normal retirement age if the participant has attained a certain age and a certain number of years of service when the shutdown occurs. Unlike most other types of benefits provided under defined benefit plans, shutdown

benefits are not required to be funded by the plan sponsor until a shutdown occurs. Internal Revenue Code ("IRC") § 412(l)(5).

PBGC is a federal agency established to administer the pension plan termination insurance program under Title IV of ERISA. ERISA § 4002; 29 U.S.C. § 1302. When a plan covered by Title IV of ERISA terminates without sufficient assets to pay benefits promised under the plan, PBGC takes over the plan and pays benefits up to the limits established in ERISA. ERISA §§ 4042(c), 4022; 29 U.S.C. §§ 1342(c), 1322. PBGC generally is required to guarantee "nonforfeitable" pension benefits, which are pension benefits for which a participant has satisfied the requirements prior to the date of plan termination, except for submission of a formal application, or the like. ERISA §§ 4001(a)(8), 4022(a); 29 U.S.C. §§ 1301(a)(8), 1322(a). Shutdown benefits usually are guaranteed if the shutdown occurs before the date of plan termination. ERISA §§ 4022(a), 4001(a)(8); 29 U.S.C. §§ 1322(a), 1301(a)(8). *See Fetty v. Pension Benefit Guaranty Corporation*, 915 F. Supp. 230, 235 (D. Colo.), *aff'd*, 104 F.3d 367 (10th Cir. 1996), *cert. denied*, 522 U.S. 812 (1997).

PBGC funds the payment of benefits under terminated plans from premiums paid by employers that sponsor plans covered by the insurance program, assets of terminated plans, statutory liability paid by employers that sponsored terminated plans, and earnings on these invested assets. ERISA §§ 4005-4007, 4062; 29 U.S.C. §§ 1305-1307, 1362.

PBGC is authorized to apply to the district court for an order terminating a plan covered under PBGC's insurance program if PBGC makes certain findings concerning the condition of the plan. ERISA § 4042(a)(1)-(4), 29 U.S.C. § 1342(a)(1)-(4). In particular, PBGC may initiate an action in district court seeking an order terminating a plan if PBGC determines that the plan will be unable to pay benefits when due or that PBGC's risk of loss with respect to the plan is

expected to increase unreasonably. ERISA §§ 4042(a)(2), (4); 29 U.S.C. §§ 1342(a)(2), (4). The district court then may order termination of the plan if it determines that the plan must be terminated to protect the interests of the plan's participants and beneficiaries or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in PBGC's liability. ERISA § 4042(c); 29 U.S.C. § 1342(c).

Termination of a plan under Title IV of ERISA also requires establishing the date of plan termination. The date of plan termination is crucial to plan participants and to PBGC. For participants, the date of plan termination is the date additional benefit accruals under the plan stop. They earn no additional benefits for work performed after the date of plan termination, and they are entitled to receive any benefit for which they had satisfied all age, service, and other requirements prior to the date of plan termination.

For PBGC, the date of plan termination determines the benefits that PBGC must pay under the plan and the amount of liability PBGC must bear with respect to the plan. ERISA § 4022(a); 29 U.S.C. § 1322(a); 29 C.F.R. § 4022.3. In most cases, an earlier date of termination will reduce PBGC's obligation to fund a plan's promised benefits.

Determination of the plan's termination date is governed by section 4048 of ERISA. 29 U.S.C. § 1348. Where, as here, the plan's administrator and PBGC do not agree on a termination date, section 4048(a)(4) of ERISA provides that the date of plan termination is "the date established by the court." 29 U.S.C. § 1348(a)(4).

Statement of Facts and Proceedings

Republic Technologies International, LLC ("RTI") was a steel company formed by mergers and purchases of various steel companies in the late 1980s and 1990s. Pet. App. 6a. It sponsored four pension plans covered by Title IV of ERISA

("RTI Plans"). *Id.* Two of the RTI Plans covered employees represented by the USWA ("Union Plans"), with terms negotiated by RTI and the USWA. *Id.*

USWA negotiated the inclusion of "shutdown" benefits in both of the Union Plans. *Id.* at 7a. The shutdown benefits protect participants in the event of a plant shutdown by permitting a participant (who otherwise expected to work until achieving 30-years of service with RTI or reaching age 62 or 65) to begin receiving his or her full pension benefit before normal retirement age if the participant has attained a certain age and a certain number of years of service when the shutdown occurs. *Id.* at 6a.

In 1998, PBGC began monitoring the financial condition of RTI and the RTI Plans. *Id.* at 8a. In 1998 and 1999, PBGC considered seeking termination of the Union Plans, but instead entered into agreements with RTI requiring RTI to make additional contributions to the Union Plans. *Id.* at 8a, 26a. From November 1998 through July 2000, however, PBGC waived enforcement of some or all of the additional contributions required under the agreements. *Id.* at 26a.

Also in 1998, RTI sought concessions from its employees in an effort to return the company to profitability. *Id.* at 7a. RTI employees represented by the USWA agreed to various concessions, including wage reductions, job elimination, and modification of health care benefits and work guarantees. *Id.* During these negotiations, USWA and RTI agreed to add shutdown benefits to one of Union Plans. *Id.* The other Union Plan already provided shutdown benefits. *Id.*

Notwithstanding these concessions, RTI was unable to return to profitability during a period of financial crisis throughout the American steel industry and filed for bankruptcy court protection in 2001. *Id.* at 8a. Under the supervision of the bankruptcy court, substantially all of RTI's assets were sold pursuant to a court-approved bidding

process. *Id.* In April 2002, before the asset sale, RTI and the USWA entered into an agreement acknowledging that the sale would constitute a "shutdown" as defined by the Union Plans. *Id.* This, in turn, would confirm that participants in the Union Plans who met the age and service requirements on or before the date of the sale could retire with the protection of the shutdown benefits promised by the Union Plans. *Id.* The shutdown agreement was submitted to the bankruptcy court for approval in May 2002, with an expected shutdown date in July 2002. *Id.*

On June 14, 2002, almost two months after RTI and the USWA entered into the shutdown agreement but before the bankruptcy court approved the sale and the shutdown occurred, PBGC unilaterally issued notices stating that it had determined to seek termination of the RTI Plans under section 4042 of ERISA and to set the date of termination at June 14, 2002, a date before the shutdown date. *Id.* at 9a-10a.

On the same day, PBGC commenced an action in the United States District Court for the Northern District of Ohio, asking the court to adjudicate termination of the RTI Plans and to establish June 14, 2002 as the date of termination. *Id.* at 10a.

PBGC conceded that it sought the June 14, 2002 termination date solely to avoid having to pay the shutdown benefits promised under the Union Plans. *Id.* By establishing a date of plan termination before the shutdown, PBGC anticipated that participants would not qualify for shutdown benefits prior to the Union Plans' termination. *Id.* at 9a, 28a. This, in turn, would save PBGC an estimated $95 million in liability for guaranteed shutdown benefits under the Union Plans. *Id.* at 9a.

The bankruptcy court subsequently approved the shutdown agreement and sale of assets by an order dated July 11, 2002 and the sale of substantially all of RTI's assets occurred on

August 16, 2002, triggering a shutdown pursuant to the shutdown agreement. *Id.* at 10a.

RTI, the plan administrator of the RTI Plans, did not agree to PBGC's proposed June 14, 2002 date of plan termination. The USWA also disagreed and intervened in the district court action to oppose PBGC's proposed date and ask the district court to establish August 17, 2002—the day after the court-approved shutdown date—as the date of plan termination of the Union Plans. *Id.*

District Court Decision

The district court ordered termination of the RTI Plans, appointed PBGC trustee of the RTI Plans, and established June 14, 2002 as the date of termination of the two non-union RTI Plans. Pet. App. 45a-46a. With respect to the Union Plans, however, the district court rejected PBGC's proposed date of plan termination and established August 17, 2002 as the date of termination of the Union Plans under section 4048(a)(4) of ERISA. *Id.* at 46a.

In doing so, the district court applied a two-part test used by a number of other federal courts under section 4048(a)(4) of ERISA. *Id.* at 39a. Under this test, the district court first identifies the expectations of plan participants, then the financial interests of PBGC, and sets a date that balances these interests. *E.g.*, *PBGC v. Broadway Maintenance Co.*, 707 F.2d 647, 652-53 (2d Cir. 1983); Pet. App. 37a, 39a.

In analyzing participants' expectations, the district court considered the notices that PBGC published on June 14, 2002 announcing the proposed termination of the Union Plans and whether those notices were sufficient to extinguish the reliance interests of participants in receiving shutdown benefits under the Union Plans. Pet. App. 40a-45a. The district court recognized that the factor most likely to give rise to the vesting of shutdown benefits under a pension plan

is the employer's financial collapse, which is the same event that would trigger termination of the pension plan. *Id.* at 41a. For this reason, the district court concluded that participants who had met the age and service requirements to receive a shutdown benefit "may reasonably rely that their benefits will vest, even in the event of plan termination, because it is highly likely that the termination will arise from the employer's cessation of operations." *Id.* at 41a.

The district court also considered the fact that participants in the Union Plans had agreed to reduced wages and other concessions in 1998 in return for continuation of the Union Plans and that, on PBGC's proposed June 14, 2002 termination date, the shutdown had been agreed upon by the parties and was expected to occur soon. *Id.* at 42a. Under these circumstances, the district court found that the mere publication of newspaper notices did not terminate the participants' reliance interests in the shutdown benefits under the Union Plans. *Id.* at 44a-45a.

Applying the second part of the two-part test, the district court considered PBGC's financial interests and whether PBGC's proposed termination date based on its financial interests was entitled to deference. *Id.* at 42a-45a. Because section 4048(a)(4) of ERISA requires the court, not PBGC, to decide the date of plan termination where PBGC and the plan administrator do not agree on the date, the court did not defer to PBGC's proposed date on that basis. *Id.* at 42a-43a. The district court considered, however, whether PBGC's proposed date was entitled to deference based on the persuasiveness of PBGC's arguments in support of the June 14, 2002 termination date. *Id.* at 43a. Acknowledging that the August 17, 2002 termination date would increase PBGC's liability for guaranteed benefits under the Union Plans, the district court did not find evidence in the administrative record assembled by PBGC that the additional shutdown benefit

liability would cause an unreasonable increase in PBGC's liabilities, require an increase in PBGC premiums, or otherwise cause specific harm to PBGC's guarantee fund. *Id.* at 43a-45a. The district court therefore did not afford PBGC's proposed termination date significant deference, and established August 17, 2002 as the date of plan termination of the Union Plans. *Id.* at 44a-45a.

Court of Appeals Decision

The court of appeals reversed the district court's decision establishing August 17, 2002 as the date of termination of the Union Plans. Pet. App. 3a. The court of appeals concluded that the district court "accorded too much weight to the participants' expectation interests in the receipt of shutdown benefits" and asserted that their interests in receiving shutdown benefits were extinguished by PBGC's June 14, 2002 publication of the newspaper notices. *Id.* at 14a. The district court "also failed to give appropriate deference to PBGC's conclusion that it faced an unreasonable increase in its liabilities if the court selected a termination date after shutdown" *Id.* at 15a. The fact that a post-termination shutdown date would cause PBGC to incur an estimated additional $95 million in liability was sufficient to require deference to PBGC's proposed date. *Id.* at 15a-16a. Information concerning the effect the additional liabilities would have on PBGC's insurance fund was not required, according to the court of appeals, because "courts have never required PBGC to produce evidence indicating the impact of additional liabilities on its insurance fund." *Id.* at 15a. Based on its conclusion that the newspaper notices extinguished participants' expectations, the district court "should have selected whatever later date served the interests of PBGC, and in this case, that date was June 14, 2002." *Id.* at 16a.

REASONS FOR GRANTING THE WRIT

PBGC's interpretation of section 4048(a)(4) of ERISA, accepted by the court of appeals, permits PBGC to withdraw

its insurance protection from pension plan participants and beneficiaries when PBGC perceives that guaranteeing the promised benefits under the plan will be too costly for the agency. This construction of section 4048(a)(4) plainly is contrary to the express terms of the statute, turning the plan termination insurance program on its head and permitting PBGC to avoid its statutory duty to protect benefits promised under insured pension plans at a time when PBGC's protection is needed most.

The court of appeals' decision further undermines the protections of Title IV of ERISA by permitting courts to abdicate their duty to decide the date of plan termination under section 4048(a)(4) of ERISA and instead permitting PBGC, in effect, to determine the date. This is contrary to the doctrine of separation of powers, standards of statutory construction, and the purposes of Title IV of ERISA.

In combination, PBGC's self-interested interpretation of section 4048(a)(4) of ERISA and the court of appeals' decision requiring courts, in effect, to defer to PBGC's interpretation puts at risk the promised benefits that Congress intended to protect under Title IV of ERISA. Review of the court of appeals decision therefore is warranted to protect the interests of participants and beneficiaries in pension plans covered by Title IV of ERISA.

I. PBGC's INTERPRETATION OF SECTION 4048(a)(4) PERMITS THE AGENCY IN ALL CASES TO AVOID ITS STATUTORY OBLIGATION TO GUARANTEE SHUTDOWN BENEFITS.

If a statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If a federal agency believes, as PBGC does here, that its statute "falls short of

providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [federal agency] or the courts, to address." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986). And it is the court's job to prevent federal agencies from manipulating statutes to achieve their own ends. *See Barnhart v. Sigmon Coal Company, Inc.*, 534 U.S. 438, 461-62 (2002) (refusing to accept agency interpretation that was inconsistent with the statute).

PBGC interprets section 4048(a)(4) of ERISA in a manner that is inconsistent with the agency's obligation to guarantee shutdown benefits. PBGC does this in an effort to defeat the balance Congress struck between the competing goals of federal revenue enhancement and protection of PBGC's financial health. In fact, PBGC interprets ERISA in a way that permits it to avoid its obligation to guarantee shutdown benefits altogether.

Shutdown and similar "unpredictable, contingent event" benefits are not required to be funded until the contingent event occurs. IRC § 412(l)(5). Because these events may never occur, permitting funding of the corresponding benefit would reduce tax revenues by giving employers a tax deduction to fund benefits that a pension plan may never pay. IRC § 404(a).

If a shutdown occurs before the date of plan termination, however, PBGC generally is required to guarantee certain types of shutdown benefits. ERISA § 4022(a), 29 U.S.C. § 1322(a). Without the incentive of a tax deduction, employers generally do not fund shutdown benefits in advance of a shutdown, which increases PBGC's liability to pay benefits under a plan that terminates after a shutdown.

To address PBGC's funding concerns, Congress in 1987 added special funding rules that required employers to fund shutdown benefits faster than other benefits once a shutdown occurs. IRC §§ 412(l)(1), (5), added by the Omnibus Budget Reconciliation Act of 1987, Pub. Law No. 100-203, 101 Stat. 1330-333 through 1330-343 (1987). Congress declined PBGC's request in 1994 to limit the agency's liability for shutdown benefits, however. 138 Cong. Rec. S4368-03, S4377-82 (March 26, 1992) (S.2485, administration proposal to strengthen minimum funding rules and limit PBGC's guaranty liabilities, including future increases in shutdown benefits, among other changes). Thus, it was Congress's judgment that PBGC should guarantee certain types of shutdown benefits, that these benefits would not be funded until the shutdown occurs, but that these benefits would be funded more rapidly than other types of benefits once a shutdown occurs.

PBGC currently and for the past few years has reported liabilities for payment of guaranteed benefits that exceed the agency's assets. For fiscal year 2004, PBGC's assets were $39 billion and its liabilities for actual and probable plan terminations were estimated to be $62 billion.[1] The obligation to pay shutdown benefits which, as a result of Congress's decisions, generally are not pre-funded, adds to PBGC's liabilities. While it is understandable that PBGC would search for ways to limit its financial obligations with respect to terminated plans, PBGC's goal of preserving its assets does not permit it to act in a manner inconsistent with the statute. *See Barnhart v. Sigmon Coal Company, Inc.*, 534 U.S. at 462 ("Congress. . . did not delegate authority to the Commissioner to develop new guidelines or to assign liability in a manner inconsistent with the statute.").

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[1] PBGC 2004 Performance and Accountability Report (Nov. 15, 2004) at 12, 13 (available at www.pbgc.gov/publications/annrpt/PAR1104.pdf).

Even if PBGC's statutory obligations under ERISA were ambiguous, PBGC's interpretation is inconsistent with the purposes of Title IV of ERISA, which require PBGC to consider its duties to participants first, and to consider protection of its own financial condition only if consistent with its duties to participants. *Arkansas v. Farm Credit Services of Central* Arkansas, 520 U.S. 821, 827 (1997) (courts must guard against interpretations which might defeat the statute's purpose and text).

The purposes of Title IV of ERISA are (1) to encourage the continuation and maintenance of private pension plans for the benefit of participants, (2) to provide for timely and uninterrupted payment of benefits to participants under plans covered by Title IV, and (3) to maintain PBGC premiums at the lowest level consistent with carrying out PBGC's duties under Title IV. ERISA § 4002(a); 29 U.S.C. § 1302(a).

Significantly, these purposes focus first on the interests of participants and beneficiaries in the continuation of pension plans and the receipt of pension benefits. ERISA § 4002(a)(1), (2); 29 U.S.C. § 1302(a)(1), (2). Here, the interest of the plan participants is and was to receive the shutdown benefits promised under their pension plans. PBGC's interest in keeping its premiums low may be considered, but only if that interest does not adversely affect the protection of participants' interests required under the first two purposes of Title IV. Under PBGC's interpretation of the law, however, PBGC was not required to consider the effect, if any, that guaranteeing shutdown benefits under the Union Plans would have on premiums. Pet 1 pp. 44a.

Contrary to the stated purposes of Title IV of ERISA, PBGC's interpretation of section 4048(a)(4) permits PBGC to protect its financial interests first notwithstanding the interests of participants in obtaining promised shutdown benefits and without considering the effect on PBGC premiums.

II. THE COURT OF APPEALS ABDICATED ITS DUTY TO DECIDE THE DATE OF PLAN TERMINATION UNDER SECTION 4048(a)(4), CONTRARY TO THE SEPARATION OF POWERS DOCTRINE.

A. Section 4048(a)(4) of ERISA Requires the Court to Decide the Date of Plan Termination to Protect Participants When PBGC's Interests Conflict With Participants' Interests.

Permitting a federal agency to control a decision that Congress delegated to the court raises a larger concern than erroneous statutory interpretation. "This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). A court, therefore, "cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented. . . ." *Kimberly v. Arms*, 129 U.S. 512, 524 (1889); *see Flournoy v. Marshall*, 842 F.2d 875, 878-79 (6th Cir. 1988) (enforcing statutory standard of review "to insure that the district courts will not abdicate their responsibility" to non-Article III judges). The court of appeals did precisely that in this case, in effect giving unreviewable deference to PBGC's proposed termination date.

Under the court of appeals' interpretation of section 4048(a)(4), PBGC has the final word in establishing the date of termination because PBGC controls when to publish newspaper notices that presumptively extinguish participants' reliance interests in continuing to receive benefits under the plan. Pet. App. 9a-10a. According to the court of appeals,

the district court then must defer to PBGC's determination of whatever later date suits the agency and its financial concerns. Pet. App. 15a-16a.

This formulation renders PBGC's decision to establish a date of plan termination unreviewable because it provides no standard that would permit a court to scrutinize whether PBGC's proposed termination date is necessary to protect the agency's financial interests. The court of appeals concluded in this case the PBGC was not required to demonstrate whether or how an additional $95 million of liability arising from the shutdown benefits would adversely affect the agency in any specific way because "courts have never required PBGC to produce evidence indicating the impact of additional liabilities on its insurance fund." Pet. App. 15a. Virtually every termination of an underfunded pension plan causes a loss to PBGC. If deference is required to PBGC's proposed date whenever PBGC faces a loss, courts always will have to defer to PBGC's proposed date. This unreviewable standard violates the terms of section 4048(a)(4) of ERISA, which require the district court, not PBGC, to decide the date of plan termination where PBGC and the plan administrator disagree.

Congress gave the court, not the PBGC, the authority to decide the date of plan termination under section 4048(a)(4) of ERISA because, as exhibited here, PBGC's "obvious interest is to protect the [PBGC] fund and premium payors." *PBGC v. Heppenstall Company*, 633 F.2d 293, 301 (3d Cir. 1980). In a plan that provides shutdown benefits, as the Union Plans did, a date of plan termination before the shutdown protects PBGC's financial interests because the agency will not have to pay the shutdown benefits. An early termination date also protects the interests of PBGC premium payers, which otherwise might face increased premiums if

PBGC's liabilities grow too large. A premature and preemptive termination date harms plan participants, however, by preventing them from earning shutdown benefits under the plan. For that reason, and consistent with the express terms of section 4048(a)(4) of ERISA, courts have recognized that "the date is to be set by the court without the deference to the agency's determination that attends the decision on whether to terminate the plan." *PBGC v. Pension Committee of Pan American World Airways, Inc.*, 777 F. Supp. 1179, 1184 (1991), *aff'd*, 970 F.2d 896 (2d Cir. 1992).

The court of appeals here did not perform its congressionally delegated duty to decide the date of plan termination under section 4048(a)(4), thereby undermining the protections of Title IV of ERISA. Without the protection afforded by the statute and required under the separation of powers doctrine, participants in the Union Plans took second place, behind PBGC and its own financial interests.

III. THE COURT OF APPEALS' INTERPRETATION OF SECTION 4048(a)(4) OF ERISA VIOLATES ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION AND THE PURPOSES OF TITLE IV OF ERISA.

Under well-established rules of statutory construction, it is the court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal citation omitted). The court of appeals' interpretation of the standard under section 4048(a)(4) for deciding the date of plan termination renders two provisions of ERISA at best, ineffective, and, at worst, superfluous.

The court of appeals does violence to Section 4022(a) of ERISA, which requires PBGC to guarantee the payment of all non-forfeitable benefits under a plan that terminates while

covered by Title IV of ERISA. 29 U.S.C. § 1322(a). Shutdown benefits generally fall into the category of guaranteed benefits if the shutdown or other triggering event occurs before the date of plan termination. *Fetty*, 915 F. Supp. at 235. Under the court of appeals' interpretation of section 4048(a)(4) of ERISA, however, PBGC will be able to establish a date of plan termination before a shutdown in virtually all cases, and therefore will never be required to guarantee shutdown benefits. Unless PBGC is unaware that a shutdown is imminent, which is unlikely,[2] PBGC always will publish a notice stating its intent to seek termination of the plan before the anticipated shutdown date. Under the court of appeals' interpretation of section 4048(a)(4), the district court must choose whatever later date PBGC decides is in the agency's interest. This date, in turn, will be a date before the anticipated shutdown, effectively eliminating PBGC's obligation under section 4022 of ERISA to guarantee shutdown benefits through PBGC's manipulation of the date of plan termination.

The court of appeals also does violence to Section 4048(a) of ERISA, which prescribes two different ways to establish the date of plan termination when a plan terminates under section 4042 of ERISA. ERISA § 4048(a)(3), (4); 29 U.S.C. § 1348(a)(3), (4). Under section 4048(a)(3) of ERISA, the termination date is the date proposed by PBGC and agreed to by the plan administrator. 29 U.S.C. § 1348(a)(3). Under section 4048(a)(4) of ERISA, in any case in which no agreement is reached between the plan administrator and PBGC, the termination date is established by the court. 29

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[2] Under its "Early Warning Program," PBGC monitors employers that maintain underfunded pension plans to permit the agency to intervene, as it deems necessary, to protect its interests or the interests of plan participants and beneficiaries. PBGC Technical Update 00-3 (July 24, 2000) (available at www.pbgc.gov/laws/techupdates/tech00-3.htm).

U.S.C. § 1348(a)(4). As interpreted by the court of appeals, a court applying section 4048(a)(4) must accept whatever date PBGC proposes so long as the date is after the date PBGC publishes newspaper notices announcing the plan termination. In other words, under this formulation, PBGC decides the date of plan termination regardless of whether the plan administrator and PBGC agree on the date. This makes sections 4048(a)(4) superfluous, because PBGC establishes the date in all events.

Statutes also must be interpreted in light of their purpose. *Farm Credit Services of Central Arkansas*, 520 U.S. at 827. As explained above, the three purposes of Title IV of ERISA put plan participants' interests in receiving benefits ahead of PBGC's financial interests. ERISA § 4002(a); 29 U.S.C. § 1302(a). The court of appeals' interpretation of section 4048(a)(4) reverses this order of priority, putting PBGC's financial interests first. Both of the above-mentioned statutory provisions can be given meaning if, in determining the date of plan termination, the expectations and interests of plan participants are properly balanced against PBGC's interest in protecting its bottom line. In applying such a test, a court could truly fulfill its statutory obligations in determining the date of plan termination. The court of appeals' construction of its obligations falls far short of this mandate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 29, 2004

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 03-4494

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff-Appellant,

v.

REPUBLIC TECHNOLOGIES INTERNATIONAL, LLC, *et al.*,
Defendant,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Defendant-Appellee.

(Argued: Aug. 11, 2004 Decided: Oct. 1, 2004)

OPINION

GIBBONS, *Circuit Judge.*

In this appeal plaintiff-appellant Pension Benefit Guaranty Corporation ("PBGC") seeks review of the district court's denial of a plan termination date that would permit PBGC to avoid payment of $95 million in unvested "shutdown" benefits to plan participants represented by defendant-appellee United Steelworkers of America ("USWA"). The appeal presents no issue as to the propriety of termination of the relevant benefit plans, which termination will result in the participants' receipt of $100 million in retirement benefits that they would not otherwise receive in the absence of PBGC's termination of the plans and guarantee of the benefits vested under them. PBGC's obligation to pay these vested benefits arose after the participants' employer Repub-

lic Technologies International, LLC ("RTI") declared bankruptcy and was unable to pay benefits under the plans.

PBGC initiated involuntary termination proceedings against four defined benefit plans administered by RTI after RTI filed its petition for bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 1101-1174. Two of the plans cover 6,027 participants represented by the USWA. These plans included provisions for shutdown benefits, which would allow eligible participants to receive an immediate unreduced early retirement benefit in the event of a permanent shutdown of one or more of RTI's facilities. The shutdown benefits were not funded or vested at the time of their negotiation. During the bankruptcy proceedings, RTI agreed to sell substantially all of its assets to a new company that had expressed an intention to hire 2,500 of RTI's 4,000 employees, but this new company did not want to assume responsibility for the pension plans. The USWA reached an agreement with RTI in April 2002, specifying that the sale of RTI's assets to the new company would constitute a "shutdown" under the plans, thereby triggering the provisions for shutdown benefits.

In the course of carrying out its statutory obligations under 29 U.S.C. § 1302(a), PBGC became concerned about the potential impact of the proposed sale on the plans and on its own financial condition. On June 12, 2002, PBGC issued notices pursuant to 29 U.S.C. § 1342(c), indicating its intent to terminate the plans, to seek its appointment as statutory trustee, and to have June 14, 2002, established as the date of plan termination. PBGC sought an immediate termination date in order to prevent the vesting of the shutdown benefit provisions that would occur with the closing of the sale of RTI's assets. PBGC also filed a complaint against RTI in federal district court for the Northern District of Ohio, seeking termination of the plans, appointment as statutory trustee, and June 14, 2002, as the date of plan termination.

The USWA was later granted leave to intervene as a party defendant. On cross motions for summary judgment, the USWA opposed only the proposed date of plan termination and asked the district court to establish a termination date of August 17, 2002—the day after the closing of the asset sale. The court found that the plan participants had a "heightened" reliance interest in the receipt of shutdown benefits and that PBGC had failed to demonstrate that a plan termination date of June 14, 2002, adequately protected its insurance fund from an unreasonable increase in liability. It established August 17, 2002, as the date of plan termination, and PBGC has appealed. We conclude that any reliance interest the plan participants had in the receipt of shutdown benefits was extinguished the day PBGC sent out the notices of termination. We also conclude that the district court failed to adhere to the governing statutory purpose and persuasive case authority and thus gave no deference to PBGC's determination that it faced an unreasonable increase in its liabilities if the court selected a termination date after "shutdown." Therefore, we reverse.

I.

Before turning to the facts of this particular case, some background on the role that PBGC plays in our nation's pension benefit insurance system is necessary. PBGC is a federal corporation that was established by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1301-1461 ("ERISA") for the purpose of administering the single-employer pension plan termination insurance program. PBGC's insurance program currently protects the pensions of approximately 44 million working men and women in slightly more than 35,000 private defined benefit pension plans. In fiscal year 2002, PBGC paid over $2.5 billion in benefits to almost 459,000 people. Under this insurance program, PBGC guarantees the payment of certain minimum pension benefits to pension plan participants in the event that a covered plan

terminates with insufficient assets to pay the benefits in full. 29 U.S.C. §§ 1302(a)(2), 1322, and 1361. PBGC receives no funds from general tax revenues. Its operations are financed using income from four basic sources: (1) insurance premiums set by Congress and paid by sponsors of defined benefit plans, (2) investment income, (3) assets in terminated plans, and (4) recoveries, if any, from employers whose underfunded plans have terminated. *See also* 29 U.S.C. §§ 1302(g)(2), 1306, and 1362.

PBGC operates under the guidance of its Board of Directors, which is composed of the Secretaries of Labor, Commerce, and the Treasury. PBGC's mission is to protect participants' pension benefits and to support a healthy retirement plan system by: (1) encouraging the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) providing timely payments of benefits in the case of terminated pension plans, and (3) making the maximum use of its resources while at the same time maintaining premiums at the lowest levels consistent with its statutory responsibilities. 29 U.S.C. § 1302(a)(1)-(3).

If a plan terminates with insufficient assets to pay guaranteed benefits, PBGC typically becomes trustee of the plan, takes over the assets and liabilities of the plan, and pays benefits to plan participants. 29 U.S.C. §§ 1322, 1342(d)(1), and 1361. ERISA provides for both voluntary termination by the plan administrator and involuntary termination by PBGC. Involuntary termination procedures may be instituted when PBGC determines that the plan is unable to pay benefits when due, 29 U.S.C. § 1342(a)(2), and when PBGC faces an unreasonable increase in liabilities with respect to the plan if the plan is not terminated. 29 U.S.C. § 1342(a)(4). If PBGC determines that a plan will be unable to pay benefits when due, it may institute court proceedings to obtain "a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any un-

reasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c).

A plan's termination date is significant because it marks the date on which benefits for plan participants cease to accrue. *Employee Retirement Income Security Act of 1974, Pension Benefit Guaranty Corp. v. Broadway Maint. Corp.*, 707 F.2d 647, 649 (2d Cir.1983). For involuntary terminations, the date of plan termination has additional importance. When an employer underfunds its pension plan and is unable to finance a minimum level of benefits, PBGC must pay those benefits, and it has the right to recover from the employer the lesser of the amount that the employer underfunded its plan or thirty percent of the employer's net worth on a date chosen by PBGC within 120 days prior to the plan's termination date. *Id.* (citing 29 U.S.C. §§ 1322 and 1362(b)). "Because involuntary termination proceedings often involve bankrupt corporations with deteriorating financial resources, the date of termination can significantly affect the extent of PBGC's recovery from the employer." *Id.* (citation omitted). A late termination date may mean that PBGC will have little chance of recovering anything from a bankrupt employer, while an earlier termination date could give PBGC the right to recover substantial assets from that same employer, based on its higher net worth at an earlier time. *Id.*

Congress expressed a clear preference that termination dates be set in advance to give plan participants warning when their benefits will stop accruing, *see* 29 U.S.C. § 1341(a), but ERISA does not require PBGC to give formal advance notice to plan participants in involuntary termination proceedings. "Congress apparently recognized that, when faced with bankrupt employers and substantial unfunded pension liabilities, PBGC might occasionally wish to establish a retroactive date of termination to limit its own

liability." *Broadway Maint.*, 707 F.2d at 649 (citing 29 U.S.C. § 1348(a)). However, despite the importance of termination dates, ERISA does not give PBGC unilateral authority to set them, even in involuntary proceedings. If the plan administrator does not agree with the date proposed by PBGC in an involuntary termination proceeding, a federal district court sets the date of plan termination. 29 U.S.C. § 1348(a)(3)-(4).

With this background in mind, we turn to the case before us.

A. Factual Background

Prior to filing for Chapter 11 bankruptcy in 2002, RTI was a leading producer of special bar quality steel products. It was formed as the result of two mergers that occurred in 1998 and 1999. As a result of those transactions, RTI incurred $850 million in secured debt and also became the sponsor and administrator of four defined benefit plans covered by Title IV of the ERISA. Two of the plans, the Republic Technologies International, LLC—USWA Defined Benefit Plan ("RESI plan") and the Republic Technologies International, LLC Pension Plan for Union Eligible Employees at the Lorain Facility ("Union plan"), provide benefits to participants represented by the USWA. These plans included provisions for "shutdown benefits." Shutdown benefits are enhanced early retirement benefits for certain workers who are affected by a facility shutdown or business cessation. They permit participants who meet certain age and service requirements to begin receiving a retirement benefit after a plant shutdown, rather than having to wait while out of work to reach a specific retirement age. Unlike other early and normal retirement benefits, shutdown benefits usually are not advance-funded.[1] Because this enhanced benefit may be paid

[1] ERISA requires sponsoring employers to fund defined benefit plans in accordance with statutory minimum funding requirements calculated

for many years before a recipient is eligible for normal retirement benefits, the cost of shutdown benefits can be very high.

Shutdown benefits were continued in the Union Plan and added to the RESI plan as a result of collective bargaining prior to the mergers in 1998. In return for the promise of shutdown benefits, the USWA agreed to concessions, including reduction of wages, elimination of jobs, and modification of health care benefits and work guarantees. The plans provide for two different types of shutdown benefits: a "70/80 benefit" and a "Rule of 65" benefit. A 70/80 benefit allows a participant who is not yet 62 and who has 15 years of service to retire and begin to receive a pension benefit when a shutdown occurs if (1) the participant is at least age 55 and the participant's combined age and years of continuous service equal 70 or more or (2) the participant's combined age and years of service equal 80 or more. A Rule of 65 benefit allows a participant who is not yet 55 and who has at least 20 years of service to retire and begin to receive a pension benefit when a shutdown occurs if the participant's combined age and years of continuous service equal at least 65 but less than 80. Both plans also provided for a $400 monthly supplement in the event of shutdown, payable until the participant is eligible to receive Social Security benefits.

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based on reasonable actuarial assumptions regarding predictable factors such as mortality, retirement age, and investment returns. 29 U.S.C. § 1082 and 26 U.S.C. § 412. Sponsoring employers are not required to fund unpredictable contingent event benefits unless and until the contingency actually occurs. 29 U.S.C. § 1082(d)(1)(B), (5), (7)(B)(i); 26 U.S.C. § 412(1)(1)(B). An "unpredictable contingent event benefit" is any benefit contingent on an event other than: (1) age, service, compensation, death, or disability, or (2) an event which is "reasonably and reliably predictable." 29 U.S.C. § 1082(d)(7)(B)(ii). According to PBGC, shutdown benefits are unpredictable contingent event benefits because they are contingent on the closing of an employer's facility and such closings are not reasonably and reliably predictable.

PBGC became concerned about RTI's financial condition as a result of the mergers in 1998 and 1999. It negotiated a series of agreements with RTI to mitigate the risks resulting from RTI's highly leveraged existence coupled with the enhanced benefits provided under the RESI and Union plans. In the first agreement, RTI agreed to make cash payments to the RESI plan in excess of minimum funding requirements. The second agreement required cash payments in excess of minimum funding requirements to the Union plan, as well as a $5 million letter of credit to secure those payments.

In spite of the mergers and agreements, RTI continued to experience financial difficulties as a result of poor market conditions, a softening economy, and a high level of debt. It filed a voluntary petition for bankruptcy on April 2, 2001. In December 2001, RTI and the USWA negotiated a modified labor agreement ("MLA") that required RTI to sell its assets unless it reorganized by May 31, 2002.

During the course of its bankruptcy case, RTI received bankruptcy court approval to sell substantially all of its assets pursuant to a court-supervised bidding process. On May 17, 2002, RTI sought court approval to sell its principal assets to "Newco." Newco expressed an intention to hire 2,500 of RTI's employees, but it did not want to assume liability for RTI's pension plans. When it became clear that RTI would be unable to reorganize, RTI and the USWA negotiated a modified successor labor agreement ("MSLA") that did not require a prospective asset purchaser to continue the pension plans. RTI and the USWA also entered into a shutdown agreement in April 2002 specifying that the sale to Newco would constitute a "shutdown" under the RESI and Union plans. On May 31, 2002, the bankruptcy court scheduled an auction of RTI's assets for July 8, 2002, and a hearing to approve the final sale and the shutdown agreement for July 9, 2002.

During this same time period, PBGC was going through the process of determining whether to involuntarily terminate the RESI and Union plans. PBGC follows the same administrative process in every case to determine whether an underfunded plan should be involuntarily terminated and the proposed date of plan termination. The Trusteeship Working Group ("TWG"), an independent body comprised of representatives from PBGC's financial, actuarial, policy and legal offices, reviews all termination recommendations developed by PBGC staff. The TWG presents its recommendations, along with supporting documents, to the "approving official." In cases involving claims of more than $100 million, the approving official is the Executive Director, who is the head of the agency. The Executive Director's decision is documented in a Notice of Determination and a Termination and Trusteeship Decision Record. On June 11, 2002, the TWG met to consider the staff recommendation that the plans in this case should be terminated. They found that both plans were underfunded and that RTI would not be able to administer the plans after its assets had been sold. Without shutdown benefits, the RESI plan was 23% funded and the Union plan was 47% funded. If the plans terminated with shutdown benefits, the RESI plan would be 14% funded and the Union plan 39% funded. In monetary terms, shutdown benefits potentially increased the amount of unfunded liabilities for the plans by almost $96 million. In light of this information, the TWG determined that the plans should be terminated and that PBGC should establish a termination date prior to shutdown. If the plans were not terminated prior to shutdown, the TWG concluded, "PBGC's long run loss [could] reasonably be expected to increase unreasonably."

On June 12, 2002, the Executive Director concurred in the TWG's recommendation and issued a Notice of Determination pursuant to 29 U.S.C. § 1342(c) for each plan. Copies were sent to the plan administrator and the USWA and they were also published in seventeen newspapers where

RTI's facilities were located. The notices indicated PBGC's determination that, "in order to avoid an unreasonable increase in the liability of the PBGC insurance fund and in order to protect the interests of the Plans' participants . . . PBGC intends to proceed pursuant to ERISA § 4042, 29 U.S.C. § 1342, to have the Plans terminated and PBGC appointed as statutory trustee, and . . . to have June 14, 2002 established as the Plans' termination date."

B. Procedural History

On the same day the notices were issued, PBGC commenced an action against RTI to terminate the plans and to set June 14, 2002, as the date of plan termination. On July 11, 2002, the bankruptcy court approved the shutdown agreement and the sale of RTI's assets to Newco. The asset sale to Newco closed on August 16, 2002. On November 1, 2002, PBGC filed a motion for summary judgment, asking the district court (1) to determine that the plans must be terminated to protect the interests of the participants and the PBGC insurance fund, (2) to appoint PBGC trustee of the terminated plans, and (3) to establish June 14, 2002, as the date of plan termination. The USWA filed a motion for partial summary judgment, disputing only the date of plan termination. It asked the court to establish August 17, 2002—the day after the closing of the asset sale to Newco—as the date of plan termination.

The district court agreed that the plans had to be terminated to protect the interests of the participants and PBGC's insurance fund, but it rejected PBGC's proposed termination date and granted the USWA's motion for partial summary judgment. The court considered the plan participants' reliance interests in shutdown benefits and weighed those interests against PBGC's interest in avoiding an unreasonable increase in unfunded liabilities. The court concluded that, despite PBGC's issuance of the notices on June 12, 2002, the plan participants continued to have strong reliance interests in

the receipt of shutdown benefits. In considering PBGC's financial interests, the court found that PBGC had failed to demonstrate that the June 14, 2002 date adequately protected its insurance fund from an unreasonable increase in liability. On balance then, the court determined that "the significant reliance interests" of the plan participants in the receipt of shutdown benefits compelled its selection of August 17, 2002 as the date of plan termination. On appeal, PBGC argues that the plan participants' reliance interests were extinguished once the notices were issued and that the district court should have deferred to its determination that the PBGC insurance fund faced an unreasonable increase in liability if the plans were not terminated prior to "shutdown."

II.

As mentioned previously, if the plan administrator and PBGC cannot agree on a plan termination date in an involuntary termination proceeding, ERISA provides that the district court will set the date. 29 U.S.C. § 1348(a)(4). Unfortunately, the statute does not provide specific guidance on what factors the court should use when making its selection. *Pension Benefit Guaranty Corp. v. Mize Co., Inc.*, 987 F.2d 1059, 1062 (4th Cir.1993); *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293, 297 (3d Cir.1980). Beginning with the Third Circuit's decision in *Heppenstall*, courts have considered two factors when setting termination dates in involuntary proceedings: the expectations of the participants and the financial implications of the termination for PBGC. *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly v. Pension Benefit Guaranty Corp.*, 991 F.2d 1415, 1419 (8th Cir.1993); *Mize*, 987 F.2d at 1062-63; *Broadway Maintenance*, 707 F.2d at 652-53; *Heppenstall*, 633 F.2d at 301. We agree that these are the most appropriate factors for us to focus on, particularly considering that ERISA provides for involuntary termination proceedings in order "to protect the interests of the par-

ticipants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c).

In *Heppenstall*, the trial court had determined that the date of termination should be the date of its final judgment terminating the pension plan. 633 F.2d at 300. On appeal, PBGC argued that the trial court's termination date imposed excessive liability on its insurance fund because it would be liable for the benefits that accrued during the trial and up to the date of final judgment. *Id.* The Third Circuit concluded that the trial court had erred by maximizing the interest of plan participants without taking into account PBGC's interest in protecting itself from unwarranted increases in liability. *Id.* The earliest appropriate date of plan termination was the date "on which participant employees had some reasonable notice that PBGC was seeking termination," because after that date, employees "no longer had a justifiable expectation in the accrual of vested pension rights." *Id.* at 302.

Subsequent courts have expanded upon the analysis in *Heppenstall*. The Second Circuit in *Broadway Maintenance* determined that district courts should follow a two-part approach when setting the date of plan termination: first, the court should determine the earliest date when the participants had actual or constructive notice of the plan's termination, *i.e.*, notice sufficient to extinguish their reliance interests. 707 F.2d at 652-53. Once that date has been ascertained, the court "should then select whatever later date serves the interests of PBGC." *Id.* The Fourth Circuit later endorsed this approach in *Mize*. 987 F.2d at 1062-63.

The district court here adopted the statutory construction advanced by *Heppenstall* and its progeny, but noted that the facts of this case nevertheless compelled it "to proceed cautiously before extending the *Heppenstall* analysis to the simplified two-part criteria espoused by *Broadway Maintenance* and *Mize*," because those cases considered the partic-

ipants' interests in "traditional" pension benefits, whereas this case involved shutdown benefits, which the court described as "inextricably intertwined to the financial well-being of the employer." This distinction was significant in the involuntary termination setting, according to the district court,

> because the factor most likely to give rise to the vesting of shutdown benefits—the financial collapse of the employer—is invariably the event that will give rise to an involuntary termination of the participants' defined benefit plan. Therefore, participants that have fulfilled the timing component of shutdown benefits . . . may reasonably rely that their benefits will vest, even in the event of plan termination, because it is highly likely that the termination will arise from the employer's cessation of operations.

The court also characterized the participants' interests in shutdown benefits as "strong" because after the signing of the shutdown agreement in April 2002, "those participants that had satisfied the timing component of '70/80' or 'Rule of 65' shutdown benefits had a reasonable expectation as to the vesting of those shutdown benefits—subject only to the Bankruptcy Court's approval of the sale to Newco." In light of these "strong" interests and the nature of shutdown benefits, the court concluded that PBGC's notice to the participants did not "presumptively terminate the participants' reliance interests" in shutdown benefits.

While it is true that the same factor giving rise to the vesting of shutdown benefits is invariably the event that will give rise to an involuntary termination of the participants' defined benefit plan, this does not mean that the participants' reliance interest in shutdown benefits remains "strong" even after they have received notice from PBGC that the plan is about to be terminated at a date prior to the vesting of those benefits. After the employees received notice that PBGC intended to terminate the pension plans on June 14, 2002, the

participants "no longer had a justifiable expectation in the accrual of vested pension rights." *Heppenstall*, 633 F.2d at 302. The USWA argues that "the overwhelming majority of courts in disputed termination date cases have chosen a date of plan termination that is on or after the date operations ceased or participants ceased to accrue benefits because of a plan amendment 'freezing' the accrual of additional benefits." (Appellee's Br. at 15, citing *Farmstead Foods*, 991 F.2d at 1421 and *Mize*, 987 F.2d at 1060-61). However, in those cases, the employer-sponsors were seeking earlier termination dates in order to minimize their liabilities to PBGC for their underfunded plans. In this case, PBGC, a self-financing public insurance corporation, is seeking an earlier termination date in order to protect its insurance fund from continued accruals of liabilities by unsound plans. The district court here accorded too much weight to the participants' expectation interests in the receipt of shutdown benefits. Every court to consider the issue has concluded that expectation interests in the accrual of benefits are extinguished on the date the participants receive reasonable notice from PBGC that the plan is going to be terminated.

Moreover, even if we agreed with the district court that PBGC's notice to the plan participants was insufficient to extinguish their reliance interests in the accrual of additional benefits, we cannot characterize their reliance interests prior to receiving the notices of termination as "strong."[2] According to the district court, qualified participants had a strong interest in the vesting of shutdown benefits after the shutdown agreement was signed in April 2002, yet at that time, the shutdown agreement was contingent on bankruptcy court approval, and that approval was not given until July 11, 2002, almost one month *after* PBGC issued the notices of

[2] We note that at the time the USWA and RTI originally negotiated the shutdown benefit, RTI was already in apparent financial difficulty and that the USWA was aware that this benefit was unvested and unfunded.

termination. Prior to bankruptcy court approval of the shutdown agreement, the cessation of RTI's operations was the only event that would trigger the vesting of shutdown benefits, and that cessation of operations had not yet occurred.

The district court also failed to give appropriate deference to PBGC's conclusion that it faced an unreasonable increase in its liabilities if the court selected a termination date after "shutdown." The court noted that there was no indication in the record regarding the impact the addition of shutdown benefits would have on PBGC's insurance fund and concluded that this omission was "of particular import because at the time PBGC rendered the termination decisions, its most recent annual report declared a surplus of approximately $7.7 billion." But PBGC is expressly authorized to terminate a plan when "the possible long-run loss of [PBGC] *with respect to the plan* may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4) (emphasis added). Notwithstanding the inappropriateness of the district court's assumption that a government entity can afford to withstand an additional $95 million in liabilities because it is currently running at a surplus, courts have never required PBGC to produce evidence indicating the impact of additional liabilities on its insurance fund. In *Mize*, for example, the Fourth Circuit noted that "PBGC's interests should be deemed to be best served by the date proposed by PBGC" and that "PBGC's expertise should be deferred to, at least to the extent of determining its own best interests." 987 F.2d at 1063. No one disputes that PBGC will incur an additional $95 million in liabilities in light of the district court's decision establishing August 17, 2002, as the date of plan termination. The USWA argues that this court should not give deference to PBGC's selection of a termination date because "PBGC's stated reason for seeking the pre-shutdown termination date is to protect its own financial interests." Courts have repeatedly emphasized that the financial interests

of *employers* should not play a role in the setting of termination dates, *see Broadway Maint.*, 707 F.2d at 652, but ERISA provides for involuntary termination proceedings precisely so that PBGC can protect its own financial interests and "avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c). The cases cited by the USWA only indicate that courts should not defer to PBGC's selection of a termination date without also considering the reliance interests of the plan's participants. In this case, the participants' reliance interests were extinguished when PBGC sent out notices indicating its intent to seek termination of the plans. Under *Broadway Maintenance* and *Heppenstall*, the district court therefore should have selected whatever later date served the interests of PBGC, and in this case, that date was June 14, 2002.

As a final note, we emphasize that, in reversing the district court's selection of a termination date, we not only adhere to the statutory scheme of ERISA and follow *Broadway Maintenance* and *Heppenstall*, but also safeguard this insurance system for the benefit of future employees while at the same time honoring the expectations of the plans' participants as much as possible.

III.

For the foregoing reasons, we reverse the district court's decision granting partial summary judgment in favor of the USWA and remand this case for further proceedings in accord with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. OHIO
EASTERN DIVISION

No. 5:02 CV 01116

PENSION BENEFIT GUARANTY CORPORATION
Plaintiff

v.

REPUBLIC TECHNOLOGIES INTERNATIONAL, LLC., et al.
Defendants

Sept. 30, 2003

MEMORANDUM OPINION AND ORDER

ECONOMUS, District Judge.

This matter is before the Court upon the following three motions: (1) the Motion of the United Steelworkers of America for Partial Summary Judgment Establishing the Date of Plan Termination (Dkt.# 52); (2) the Motion of Pension Benefit Guaranty Corporation for Summary Judgment (Dkt. # 54); and (3) Republic Technologies International, LLC's Motion for Interim Appointment of Trustee (Dkt.# 64).

I. STATUTORY OVERVIEW

A. The Employee Retirement Income Security Act of 1974

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"), Pub.L. No. 93-406, 88 Stat. 829, (codified, *as amended*, at 29 U.S.C. §§ 1001-1461

(2003)), *inter alia*, "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by termination of pension plans before sufficient funds [had] been accumulated in the plans." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) (citing *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980)). *See also* 29 U.S.C. § 1001(a) (including among ERISA's congressional findings "that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits"). As codified, ERISA has three principal subchapters. Subchapter I addresses the protection of employee pension benefit rights by establishing "rules for reporting and disclosure, participation and vesting, funding of pension trust, fiduciary responsibility, and administration and enforcement." *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1014 (6th Cir.1980); *see* 29 U.S.C. §§ 1001-1191. Subchapter II establishes the enforcement jurisdiction of various federal departments and agencies over the statute's provisions, as well as creates the joint pension task force. *See* 29 U.S.C. §§ 1201-1242. The final subchapter—Subchapter III—provides insurance coverage for pension benefits plans. *See* 29 U.S.C. §§ 1301-1461. As the instant action arises from Subchapter III's "comprehensive and reticulated" provisions, *Nachman*, 446 U.S. at 361, 100 S.Ct. 1723, a brief overview of the subchapter's structure and text will aid the further analysis of this case.

B. The Pension Benefit Guaranty Corporation

Subchapter III is the "key to the congressional plan," *Page v. Pension Benefit Guaranty Corp.*, 968 F.2d 1310, 1311 (D.C.Cir.1992) (Ginsburg, J.), designed "to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive

it,' "*R.A. Gray & Co.*, 467 U.S. at 720, 104 S.Ct. 2709 (quoting *Nachman*, 446 U.S. at 375, 100 S.Ct. 1723). Toward this end, Congress created the Pension Benefit Guaranty Corporation ("PBGC")—"a wholly-owned United States government corporation within the Department of Labor, modeled after the Federal Deposit Insurance Company." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 636-37, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (citing Cong. Rec. 29950 (1974) (statement of Sen. Bentsen)); *see also* 31 U.S.C. § 9101(1), (3)(J) (listing PBGC among "wholly-owned Government corporation[s]"). Congress vested PBGC with the authority to enforce and administer a mandatory Government insurance program that currently protects the pension benefits of over 44 million private-sector American workers who participate in 32,500 defined benefit pension plans.[1] *See generally* 29 U.S.C. § 1302; (Dkt. # 62, Supplemental Aff. of Wayne McKinnon ("McKinnon Supplemental Aff.") ¶ 2 and Ex. # 1 attached thereto, ("2002 Annual Report") at 5) (providing the most current data as to the extent of PBGC's operations).

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[1] A defined benefit plan is one which sets forth a fixed level of benefits to be paid on a monthly basis to a participant in the plan upon the participant's retirement. *See* 29 U.S.C. § 1002(35). "Contributions to a defined benefit plan are calculated on the basis of a number of actuarial assumptions about such things as employee turnover, mortality rates, compensation increases, and the rate of return on invested plan assets." *Mead v. Tilley*, 490 U.S. 714, 717, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989) (citation omitted).

The term "'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." *See* 29 U.S.C. § 1002(7).

PBGC's Operations

The Secretaries of the Treasury, Commerce, and Labor comprise PBGC's board of directors (the "Board"). *See* 29 U.S.C. § 1302(d).[2] The Board must administer PBGC's operations in accordance with three purposes:

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans . . . , and

(3) to maintain premiums established by the corporation under section 4006 [29 U.S.C.S. § 1306] at the lowest level consistent with carrying out its obligations under this title.[3]

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[2] Title 29 of the United States Code, section 1302(d) provides:

> The board of directors of the corporation consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce. Members of the board shall serve without compensation, but shall be reimbursed for travel, subsistence and other necessary expenses incurred in the performance of their duties as members of the board. The Secretary of Labor is the chairman of the board of directors.

29 U.S.C. § 1302(d).

[3] Throughout this Memorandum Opinion and Order, the Court frequently quotes directly from ERISA's provisions. The practice yields the potential for interpretative difficulty because, as evidenced in 29 U.S.C. § 1302(a)(3), ERISA repeatedly refers to "titles." The session law originally divided ERISA into four titles. Upon codification, the four titles of the session law were re-named "subchapters" to fit the scheme of the United States Code. Unless otherwise noted, reference to the official United States Code points out that "title" should read "subchapter." Nevertheless, it remains a common practice among the bench and bar to refer to ERISA's titles. *See, e.g., LTV*, 496 U.S. at 637, 110 S.Ct. 2668 ("The PBGC administers and enforces Title IV of ERISA."). For ease of reference, this Memorandum Opinion and Order shall refer to the sections

29 U.S.C. § 1302(a)(1),(2),(3) (bracketed material in the original).

PBGC's operations include collecting insurance premiums from covered pension plans and providing benefits to participants in those plans if the plan terminates with insufficient assets to support its guaranteed benefits. *See* 29 U.S.C. §§ 1322, 1361 (establishing the types of guaranteed benefits and PBGC's mandate to pay guaranteed benefits upon termination, respectively). PBGC derives financing for its operations from four sources: (1) the insurance premiums set by Congress and paid by sponsors of defined benefit plans; (2) assets from terminated pensions plans trusteed by PBGC; (3) investment income; and (4) recoveries from the companies formerly responsible from trusteed plans. *See* (McKinnon Supplemental Aff. ¶ 2 and 2002 Annual Report at 39); *see also* (Dkt. # 55, Mem. of Points and Authorities in Supp. of Mot. of Pension Benefit Guaranty Corp. for Summ. J. ("Pl.'s Mem. in Supp."), Ex. # 3 attached thereto at 2).

Plan Terminations

PBGC's principal operations are to monitor and, under limited circumstances, initiate the termination of defined benefit plans where the plans have insufficient assets to satisfy their obligations to participants. In this situation, PBGC "becomes the trustee of the plan, taking over the plan's assets and liabilities." *LTV*, 496 U.S. at 637, 110 S.Ct. 2668. PBGC thereafter merges the remaining assets of the terminated plan with its own funds to "ensure payment of most of the remaining 'non-forfeitable benefits.'"[4] *See* 29 U.S.C. §§ 1301(a)(8),

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of ERISA according to the designations given upon codification in the United States Code.

[4] The statute defines a "nonforfeitable benefit" as follows:

> [W]ith respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act (other than submission of a formal

1322(a) & (b); *LTV*, 496 U.S. at 638, 110 S.Ct. 2668. PBGC then pays benefits according to congressionally prescribed limits. *See* 29 U.S.C. § 1322(b)(3)(B).

Congress has entrusted PBGC with the authority to conduct both voluntary and involuntary terminations of defined benefit plans. *See* 29 U.S.C. §§ 1341- 42. Voluntary terminations take two forms. First, a "standard termination" occurs when the employer has sufficient assets to pay all the benefit commitments of a terminated plan. *See* 29 U.S.C. § 1341(b); *see also LTV*, 496 U.S. at 639, 110 S.Ct. 2668. The second form of voluntary termination occurs when the company does not have sufficient funds to pay its obligations to the employees. *See* 29 U.S.C. § 1341(c). Under this latter form of termination, the employer must demonstrate financial distress to PBGC. *See* 29 U.S.C. § 1341(c).

Similarly, involuntary termination proceedings generally involve business entities that are experiencing severe financial difficulty. *See* 29 U.S.C. § 1342. Indeed, PBGC must initiate involuntary termination proceedings against a defined benefit plan when it determines that any of the following four factors are present:

> (1) the plan has not met the minimum funding standard . . . [;]
>
> (2) the plan will be unable to pay benefits when due[;]

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application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this Act or the Internal Revenue Code of 1986 [26 USCS §§ 1, *et seq.*].

29 U.S.C. § 1301(a)(8) (bracketed material in the original).

> (3) the reportable event described in section 4043(c)(7) [29 USCS 1343(c)(7)] has occurred[;] or
>
> (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

29 U.S.C. § 1342(a)(1),(2),(3),(4) (brackets in original).

Where PBGC seeks involuntary termination, the statute authorizes the plan administrator[5] and PBGC to select a mutually acceptable date for plan termination ("DOPT"). *See* 29 U.S.C. § 1348(a)(3). If the parties are unable to reach an agreement, the statute vests the court with the authority to select an appropriate DOPT. *See* 29 U.S.C. § 1348(a)(4).

II. FACTUAL HISTORY [6]

The instant action arises from the PBGC's initiation of involuntary termination proceedings against four defined benefit plans administered by the Defendant, Republic Technologies International, LLC ("RTI").

A. RTI

During all times relevant, RTI was a leading domestic producer of special bar quality ("SBQ") steel products. *See* (Dkt. # 1, Compl. ¶ 6; Dkt. # 11, Answer ¶ 6; A.R.[7] 12, 185).

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[5] The statute defines a plan administrator as: "(i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe." 29 U.S.C. § 1002(16)(A); *see also* 29 U.S.C. § 1301(a)(1).

[6] The following facts are undisputed unless otherwise noted.

[7] The Court's citation to "A.R." refers to the Administrative Record filed with the Court. *See* (Dkt. 29-38).

RTI supplied SBQ steel products primarily to the automotive and industrial equipment industries. *See* (A.R.12, 185).

RTI is the surviving entity from several mergers and purchases of steel companies throughout the late 1980s and 1990s. RTI's emergence dates to 1989 when Republic Engineered Steels, Inc. ("RESI") was formed to operate the assets of the former Bar Division of LTV Steel Company, Inc. *See* (A.R.185). In 1998, RES Holding Corporation acquired RESI and merged RESI's assets with those of BarTech, an entity operating the former Bar, Rod, and Wire Division of Bethlehem Steel Corporation and the assets of Bliss and Laughlin Industries (hereinafter the "1998 merger"). *See* (A.R.12, 185). In 1999, RESI/BarTech joined with USS /Kobe Steel Company[8] to form RTI (hereinafter the "1999 merger"). RTI incurred approximately $850 million in secured debt as a result of the 1998 and 1999 mergers. Moreover, RTI became the plan administrator of four defined benefit plans: (1) the Republic Technologies International, LLC--USWA Defined Benefit Plan (the "RESI Plan"); (2) the Republic Technologies International, LLC Pension Plan for Union Eligible Employees at the Lorain Facility (the "Union Plan"); (3) the Republic Technologies International, LLC Pension Plan for Salaried Employees of the Former USS/ KOBE Steel Company (the "Salaried Plan"); and (4) the Republic Technologies International, LLC Non-contributory Pension Plan for Hourly Paid Employees at Medina, Ohio (the "B & L Plan") (hereinafter collectively referred to as the "Plans"). *See* (Dkt. # 1, Compl. ¶ 7; Dkt. # 11, Answer ¶ 7). The Plans have a total of 6,237 participants. *See, e.g.*, (Dkt. # 1, Compl. ¶ 11; Dkt. # 11, Answer ¶ 11; A.R. at 16).

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[8] USS/Kobe Steel Company was a 50/50 joint venture formed in July, 1989 between subsidiaries of USX Corporation and Kobe Steel, Ltd.

B. Shut-down Benefits

In order to facilitate the 1998 and 1999 mergers, RTI negotiated new labor and pension agreements with the Intervenor-Defendant, United Steel Workers of America ("USWA" or "Union"), that included plant closures, as well as improved benefits to hourly employees. *See* (A.R.12). Significantly, RTI agreed to continue providing "shut-down benefits" to participants of the Union Plan and agreed to enhance the RESI Plan by providing similar shut-down benefits. *See* (A.R.12, 1211-12, 1222, 1392-93, 1398-1400).

Specifically, RTI agreed to provide "Rule of 65" and "70/80" shut-down benefits that allowed otherwise eligible participants to receive an immediate unreduced early retirement benefit in the event of a permanent shut-down of RTI's facilities.[9] *See* (A.R.12, 1211-13, 1222, 1392-93, 1398-1400). Furthermore, the Union Plan and the RESI Plan provided all employees eligible for shut-down benefits with an additional payment of $400 per month payment at the time of RTI's permanent shut-down, until the employee is eligible for social security benefits. *See* (A.R.12, 1221-25, 1398-1400).

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[9] Pursuant to the terms of the Union Plan and RESI Plan, an RTI employee is eligible to receive "70/80" shut-down benefits where: (1) the employee has not attained the age of 62 years and has at least 15 years of continuous service; (2) the employee has attained the age of 55 years and his/ her combined age and years of continuous service equal 70 or more OR the employee has a combined age and years of continuous service equal to 80 or more; and (3) RTI permanently has shut-down its facilities. *See* (A.R.12, 1211-12, 1392). The Union Plan and RESI Plan alternatively provide that a RTI employee is eligible to receive "Rule of 65" shut-down benefits where: (1) the employee has not attained the age of 55 years; (2) the employee has at least 20 years of continuous service; (3) the employee's combined age and years of continuous service equal at least 65 years but less than 80 years; and (4) RTI permanently has shut-down its facilities. *See* (A.R.16, 1212-13, 1393).

C. PBGC's Response

PBGC recognized that RTI's highly-leveraged existence, coupled with the enhanced benefits provided under the RESI Plan and the Union Plan, placed PBGC's insurance fund at an increased risk. *See* (A.R.12). Consequently, PBGC negotiated agreements with RTI whereby RTI pledged to make payments in excess of the statutory minimum in return for PBGC's agreement to refrain from initiating termination proceedings. *See* (A.R.12, 352-63).

RTI thereafter experienced financial difficulty as a result of poor market conditions, a softening economy, and a high level of debt. *See* (A.R.13, 185-86). At RTI's request, PBGC repeatedly agreed to defer RTI's contribution payments. *See* (A.R.364-383). PBGC ultimately agreed to defer RTI's contributions until January 1, 2002. *See* (A.R.364-66).

D. The Bankruptcy Proceedings

On April 2, 2001, RTI filed a voluntary petition pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 1101-1174, in the United States Bankruptcy Court for the Northern District of Ohio. *See In re: Republic Technologies International, LLC, et al.*, 01-51117-01-51120; *see also* (Dkt. # 1, Compl. ¶ 8; Dkt. # 11, Answer ¶ 8).

The Modified Labor Agreement

During the bankruptcy proceedings, RTI and the Union entered into a Modified Labor Agreement, dated January 24, 2002 (the "MLA"), that, *inter alia*, (1) reduced employee wages fifteen percent; (2) eliminated 200 hourly positions; (3) modified certain health care benefits; and (4) modified certain guarantees of forty-hour workweeks. *See* (A.R.13, 186, 1138, 1919-2053). The MLA further provided that RTI and the Union would work in good faith to achieve a restructuring plan designed: (1) to assist RTI in securing a $250 million Emergency Steel Loan Guarantee from the federal

government; (2) to assist RTI in obtaining PBGC and Internal Revenue Service ("IRS") approval on a further extension of contribution payments to the Plans; and (3) to provide RTI with authority to use equity and interest bearing debt to satisfy the claims of creditors (hereinafter collectively the "restructuring conditions"). *See* (A.R.13, 186, 1138, 1919-2053). In the event RTI satisfied the restructuring conditions, the MLA required RTI to implement certain long-term provisions that afforded the Union with twenty-percent stock ownership in RTI and increased pension benefits and wages. *See* (A.R.13, 186, 1138, 1919- 2053). Conversely, the MLA provided that in the event RTI failed to meet the restructuring conditions on or before May 31, 2002, RTI was to liquidate and sell its assets. *See* (A.R.13, 186, 1138, 1919-2053). In the event of liquidation, the Union agreed to adopt a successor labor agreement that minimized the costs to a potential purchaser. *See* (A.R.13, 186, 1138, 1919- 2053).

Newco, the Successor Labor Agreement and the Shut-down Agreement

RTI failed to meet the restructuring conditions on or before May 31, 2002. Meanwhile, KPS Special Situations Fund, L.P. ("KPS") and Pegasus Partners II, L.P. ("Pegasus") (collectively "Newco"), declared their joint interest in purchasing RTI's assets. *See* (A.R. 13, 40). Additionally, Newco expressed its intention to hire 2,500 of RTI's 4,000 employees. *See* (A.R.13, 40). Accordingly, the Union and Newco submitted for the Bankruptcy Court's approval a Successor Labor Agreement ("SLA") that, *inter alia*, did not require Newco to assume the Plans. *See* (A.R.92-133, 1948-53). Additionally, the Union and RTI entered into a Letter Agreement, subject to the Bankruptcy Court's approval, whereby the Union agreed to withhold any objections to the proposed sale in consideration for RTI's agreement that any sale would constitute a "shut-down" pursuant to the RESI Plan and Union Plan (hereinafter the "Shut-down Agreement"). *See*

(A.R.13, 143-152.) The Bankruptcy Court thereafter scheduled an auction of RTI's assets for July 9, 2002. *See* (A.R. 19-27).

E. PBGC's initiation of involuntary termination procedures

PBGC immediately undertook an examination of the potential impact of the proposed sale on the Plans' participants, as well as the potential impact of the sale on its financial condition. On June 11, 2002, the Trustee Working Group ("TWG")[10] recommended to PBGC's Executive Director that PBGC initiate involuntary termination procedures against all of the Plans. *See* (A.R.3-338). The TWG further recommended that the Executive Director set an immediate DOPT in order to prevent the vesting of the RESI Plan and Union Plan shut-down benefit provisions. *See* (A.R. 18, 314-22 337-38).

The Executive Director concurred in the TWG's recommendation and issued a Notice of Determination ("NOD") pursuant to 29 U.S.C. § 1342(c) for each plan.[11] *See* (Dkt.

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[10] The TWG is composed of a Chairperson, who is a voting representative from the PBGC's Office of the Deputy Executive Director and Chief Operating Officer; voting representatives from the Office of the General Counsel, the Insurance Operations Department, the Corporate Policy and Research Department, and the Corporate Finance and Negotiations Department; and nonvoting representatives from the Financial Operations Department and the Communications and Public Affairs Department. The TWG reviews all pertinent information regarding an involuntary termination and submits a written recommendation to PBGC's Executive Director. *See* (Dkt. # 55, Pl.'s Mem. in Supp., Ex. # 4 attached thereto).

[11] Section 1342(c) provides that "[i]f the corporation [PBGC] is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that a plan should be terminated, it may upon notice to the plan administrator, apply

1, Compl. ¶¶ 18-27 & Ex. # 1 attached thereto; Dkt. # 11, Answer ¶¶ 18-27; A.R. 1-2, 314-22, 339-50). The NODs indicated: (1) that PBGC intended to terminate the Plans; (2) that PBGC would seek its appointment as statutory trustee of the Plans; and (3) that PBGC intended to have June 14, 2002 established as the DOPT. *See* (Dkt. # 1, Compl. ¶¶ 18-27 & Ex. # 1 attached thereto; Dkt. # 11, Answer ¶¶ 18-27; A.R. 1-2, 314-22, 339-50).

F. The proceedings before this Court

On June 14, 2002, PBGC filed a Complaint requesting that the Court: (1) adjudicate that the Plans are terminated pursuant to 29 U.S.C. § 1342(c); (2) appoint PBGC statutory trustee of the Plans; (3) order all parties having property, assets, or records, relevant to this matter to turn over such materials to the PBGC; and (4) establish June 14, 2002 as the DOPT pursuant to 29 U.S.C. § 1348(a)(4). *See* (Dkt. # 1, Compl. at 12). The Court subsequently granted the Union's motion to intervene as a party-defendant. *See* (Dkt.# 20).

The instant motions ensued.

G. The Bankruptcy Court's approval of the sale

On July 11, 2002, the Bankruptcy Court approved the sale of RTI's assets to Newco; consequently, it approved the SLA and the Shut-down Agreement. *See* (Dkt. # 55, Pl.'s Mem. In Support, at Ex. 8 attached thereto). However, the Bankruptcy Court's order expressly provided that "the approval of these agreements is without prejudice to the rights of the [PBGC] under [ERISA] or in the pending District Court litigation,

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to the appropriate United States district court for a decree." 29 U.S.C. § 1342(c).

PBGC published the NODs in seventeen newspapers, including USA Today. *See, e.g.*, (A.R.343-48). PBGC additionally mailed the NODs to the Union's local and international offices. *See* (A.R.339-342). It is undisputed that the Union received the NODs on June 14, 2002.

PBGC v. RTI, Case No.5[:]02 CV 1116 (N.D.Ohio) (Economus, J.)." *See* (Dkt. # 55, Pl.'s Mem. In Support, at Ex. 8 attached thereto at 12-13).

The asset sale closed on August 16, 2002. *See* (Dkt. # 56, Mem. in Support of United Steelworkers of America's Motion for Partial Summ. J. Establishing the Date of Plan Termination ("Union's Mem. in Support") at App. A ¶ 2.) RTI declared a shut-down of its facilities effective August 16, 2002. *See* (Dkt. # 55, Pl.'s Mem. In Support, at Ex. 9 attached thereto).

II. STANDARD OF REVIEW

Summary judgment is proper where there lacks any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In considering such a motion, the court must review all of the evidence in the record. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *accord Graham- Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 556-57 n. 7 (6th Cir.2000). The central issue is "whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. 2505.

"A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548 (quoting FED. R. CIV. P. 56(c)). The movant meets this burden "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Clayton v. Meijer, Inc.*, 281 F.3d 605, 609 (6th Cir.2002) (quoting *Celotex*, 477 U.S. at 324-25, 106 S.Ct. 2548). The non-movant then "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505.

"The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989) (quoting *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505). "A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505.

III. LAW AND ANALYSIS

A. The termination of the Plans pursuant to 29 U.S.C. § 1342

Title 29 of the United States Code, § 1342(c) provides:

> If the corporation [PBGC] is required under subsection (a) of this section to commence proceedings under this

> section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that a plan should be terminated, it may upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.

29 U.S.C. § 1342(c). Where, as here, PBGC invokes 29 U.S.C. § 1342(c), this Court previously has determined that it shall adopt the PBGC's decision to terminate a plan unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* (Dkt. # 47 at 8-9); *see also* 5 U.S.C. § 706(2)(A) (establishing that a court must uphold final agency action unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

Termination of the Plans pursuant to 29 U.S.C. § 1342(a)(2)

During the administrative process, PBGC determined that 29 U.S.C. § 1342(a)(2) compelled the involuntary termination of the Plans because each plan was unable to pay benefits when due. *See* (Dkt. # 1, Compl. ¶¶ 29, 38, 47, 56; A.R. 1-3, 5, 314-32, 336-50).

PBGC specifically determined the following with respect to the RESI Plan: (1) the Plan had approximately $344 million in liabilities (including shut-down benefits); (2) the Plan had approximately $219 million in liabilities (excluding shut-down benefits); (3) the Plan had approximately $56 million in assets; therefore, (4) the Plan had unfunded benefit liabilities of approximately $287 million (with shut-down benefits) and $162 million (without shut-down benefits). *See* (A.R.7).

PBGC specifically determined the following with respect to the Union Plan: (1) the Plan had approximately $284 million in liabilities (including shut-down benefits); (2) the Plan had approximately $240 million in liabilities (excluding shut-down benefits); (3) the Plan had approximately $102 million in assets; therefore, (4) the Plan had unfunded benefit liabilities of approximately $181 million (with shut-down benefits) and approximately $137 million (without shut-down benefits). *See* (A.R.7).

With respect to the Salaried Plan, PBGC determined the following: (1) the Plan had approximately $10 million in liabilities; (2) the Plan had approximately $5 million in assets; therefore, (4) the Plan had unfunded benefit liabilities of approximately $ 5 million. *See* (A.R.7).

With respect to the B & L Plan, PBGC determined the following: (1) the Plan had approximately $1.8 million in liabilities; (2) the Plan had approximately $1.2 million in assets; therefore, (4) the Plan had unfunded benefit liabilities of approximately $ 600 hundred thousand. *See* (A.R.7).

Overall, PBGC determined that the Plans had unfunded benefit liabilities of approximately $475 million (including shut-down benefits) or $306 million (excluding shut-down benefits). *See* (A.R. 7). PBGC further determined that RTI would not be able to fund the Plans after the asset sale, and that it was improbable that a potential purchaser would assume liability under the Plans. *See* (A.R.2-3, 17, 336-38). Accordingly, PBGC concluded that "termination of all four Plans was necessary in order to protect the interests of Plan participants because the Plans were underfunded, would be unable to pay benefits when due, and would be abandoned." *See* (A.R.337); *see also* (A.R.17, 316, 321,326, 331, 336).

Termination of the Plans pursuant to 29 U.S.C. § 1342(a)(4)

PBGC additionally determined that 29 U.S.C. § 1342(a)(4) required the involuntary termination of the RESI Plan and

Union Plan because the "possible long-run loss of [PBGC] with respect to the plan[s] [could] reasonably be expected to increase unreasonably if the plan[s] [were] not terminated." *See* (A.R.3-5, 10, 12, 17, 316, 321, 337-38). In reaching the long-run loss determination, PBGC determined that its guaranty extended to approximately $188 million (including shut-down benefits) or approximately $122 million (excluding shut-down benefits) of RESI Plan benefits. *See* (A.R.7). PBGC further determined that approximately $132 million of the RESI Plan benefits (including shut-down benefits) or approximately $66 million (excluding shut-down benefits), were unfunded guaranteed benefits. *See* (A.R.7).

Similarly, PBGC determined that its guaranty extended to approximately $174 million (including shut-down benefits), or approximately $144 million of Union Plan benefits (excluding shut-down benefits). *See* (A.R.7). PBGC further determined that approximately $72 million (including shut-down benefits) or approximately $44 million (excluding shut-down benefits) of the Union Plan benefits were unfunded guaranteed benefits. *See* (A.R.7).

Consequently, PBGC concluded that the long-run loss posed by a combined $108 million (excluding shut-down benefits), or $204 million (including shut-down benefits) in unfunded guaranteed benefits for the Union Plan and RESI Plan, threatened to unreasonably increase the liability of the PBGC insurance fund. *See* (A.R.4,5,18, 316, 326, 336-38).

The 29 U.S.C. § 1342(c) criteria

PBGC requests a decree from this Court terminating the Plans pursuant to 29 U.S.C. § 1342(c) in order to protect the interests of the plan participants. *See* (Dkt.# 1, Compl.¶¶ 31, 40, 49, 58). PBGC additionally requests a decree from this Court terminating the Union Plan and RESI Plan in order "to avoid an unreasonable increase in the liability of the PBGC insurance fund." *See* (Dkt.# 1, Compl.¶¶ 31, 40.)

It is undisputed that PBGC acted within its authority when it initiated the involuntary termination procedures pursuant to 29 U.S.C. § 1342(a)(2). Furthermore, there lacks any dispute as to the propriety of the Court's termination of the Plans.

The Court, therefore, finds that the PBGC's determinations were neither arbitrary, capricious, nor an abuse of discretion. The Court additionally finds that PBGC acted in accordance with all applicable laws in reaching its termination decision pursuant to 29 U.S.C. § 1342(c).

Consequently, the Court shall defer to the PBGC's determinations that the RESI Plan, the Union Plan, the Salaried Plan and the B & L Plan must be terminated in order to protect the interests of the Plans' participants. The Court further shall defer to the PBGC's determinations that the RESI Plan and the Union Plan must be terminated in order to prevent any unreasonable increase in the liability of the PBGC insurance fund.

Accordingly, the Court hereby orders that the RESI Plan, the Union Plan, the Salaried Plan and the B & L Plan are TERMINATED pursuant to 29 U.S.C. § 1342(c).

B. The appointment of PBGC as statutory trustee of the Plans

Title 29 of the United States Code, § 1342(c) provides that

> Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle [29 USCS §§ 1341 *et seq.*].

29 U.S.C. § 1342(c).

PBGC requests that the Court appoint it as statutory trustee pursuant to 29 U.S.C. § 1342(c). *See* (Dkt.# 1, Compl.¶¶ 32,

36, 41, 45, 50, 54, 59, 63). The Defendants do not oppose this request.

Accordingly, the Court hereby orders that the PBGC is APPOINTED statutory trustee of the RESI Plan, the Union Plan, the Salaried Plan and the B & L Plan pursuant to 29 U.S.C. § 1342(c). PBGC shall have all powers vested in the statutory trustee as provided in 29 U.S.C. § 1342(d) and all other applicable provisions of ERISA. In addition, PBGC is authorized to terminate the plan in accordance with the mandate of 29 U.S.C. § 1342(c).

C. The appropriate date of plan termination pursuant to 29 U.S.C. § 1348(a)(4)

The evolving judicial standards governing the appropriate DOPT

The principal dispute in this matter arises from PBGC's selection of June 14, 2002 as the DOPT. Title 29 of the United States Code, § 1348 provides, in pertinent part:

> (a) For the purposes of this title the termination date of a single-employer plan is—
>
> (1) in the case of a plan terminated in a standard termination in accordance with the provisions of section 4041(b) [29 USCS § 1341(b)], the termination date proposed in the notice provided under section 4041(b) [29 USCS § 1341(b)],
>
> (2) in the case of a plan terminated in a distress termination in accordance with the provisions of section 4041(b) [29 USCS § 1341(c)], the date established by the plan administrator and agreed to by the corporation,
>
> (3) in the case of a plan terminated in accordance with the provisions of section 4042 [29 USCS § 1342], the date established by the corporation and agreed to by the plan administrator, or

> (4) in the case of a plan terminated under section 4041(c) or 4042 [29 USCS § 1341(c) or 1342] in any case in which no agreement is reached between the plan administrator and the corporation (or the trustee), the date established by the court.

29 U.S.C. § 1348(a) (bracketed material in original). Where, as in the instant case, the plan administrator and PBGC are unable to agree on a termination date, Section 1348(a)(4) vests the district court with the authority to establish the DOPT.

Section 1348(a)(4) lacks, however, any express standard to guide the Court's analysis. *See Pension Benefit Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293, 297 (3d Cir.1980) ("Nowhere in the statute . . . is there any explicit standard for the court's guidance in selecting a date. Moreover, the parties have not called to our attention any legislative history suggesting specific congressional attention to that problem."). Addressing this lack of statutory guidance, the first court called upon to select a termination date construed the statute as requiring it to apply the "statutory standard in section 1342(c)." *Heppenstall*, 633 F.2d at 300. The *Heppenstall* court therefore concluded that the termination date should be selected "in order to protect the interests of the participants and to avoid any further deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." *See Heppenstall*, 633 F.2d at 301-02 (discussing 29 U.S.C. § 1342(c)).

In applying the standard, the *Heppenstall* court proposed a three-part analysis: "first, identify the interests of all of the plan participants and the PBGC, second, establish the parameters which maximize those respective interests, and third, within the limits of the statute set the termination date accordingly." *United Steel Workers of Am. v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3d Cir.1983) (explaining in detail the *Heppenstall* court's analysis as well as the ration-

ales underlying the analysis) (citation and internal quotations omitted).

Subsequent courts have expounded on the *Heppenstall* approach. In *Pension Benefit Guaranty Corp. v. Broadway Maint. Co.*, 707 F.2d 647 (2d Cir.1983), the court opined that "[a]s in *Heppenstall* . . . this case should begin by determining the earliest date when the Plan's participants had actual or constructive notice, *i.e.*, notice sufficient to extinguish their reliance interest . . . Once that date is ascertained, the District Court should then select whatever later date serves the interests of PBGC." *Broadway Maint.*, 707 F.2d at 652-53. The United States Court of Appeals for the Fourth Circuit summarized *Broadway Maintenance Corp.* as follows:

> Instead of merely balancing the employee's reliance interests and PBGC's financial interests in the overall insurance fund, the *Broadway Maintenance* court established a two[ ]step test: (1) select the earliest date on which participants had notice of termination[;] and (2) "then select whatever later date serves the interests of PBGC." This test is based on two assumptions: (1) that the reliance interests of the participants will never be diminished by the selection of a postnotice date[;] and (2) that the date selected by PBGC adequately protects PBGC's interests.

Pension Benefit Guaranty Corp. v. Mize Co., 987 F.2d 1059, 1063 (4th Cir.1993) (internal citation omitted).

The parties' proposed DOPTs

In the instant matter, PBGC asserts that an application of the foregoing *Broadway Maintenance* test compels the Court's selection of June 14, 2002 as the DOPT. *See* (Pl.'s Mem. in Supp. at 22-30); (Dkt. # 60, Mem. of the Pension Benefit Guaranty Corp. in Opp'n to Mot. of United Steelworkers of America for Partial Summ. J. Establishing the Date of Plan Termination ("Pl.'s Opp'n") at 2-23). Specifi-

cally, PBGC asserts that it effected "widespread publication" of the NODs on June 14, 2002, thereby providing reasonable notice to the participants that their pension benefits, including shutdown benefits, would cease to accrue after that date. *See* (Pl.'s Mem. in Supp. at 26). PBGC further asserts that a termination date of June 14, 2002 protects its financial interests in that such a date prevents the vesting of an additional unfunded liability of approximately $96 million in shut-down benefits. *See* (Pl.'s Mem. in Supp. at 29).

The Union counters that PBGC's "draconian application of the notice requirement cannot be reconciled with the purposes of ERISA, which put promotion of the establishment and maintenance of pension plans for the benefit of participants and the uninterrupted payment of participants' benefits, before any consideration of PBGC's financial interests." (Dkt. # 56, Mem. in Support of United Steelworkers of America's Motion for Partial Summ. J. Establishing the Date of Plan Termination ("Union's Mem. in Support") at 17.) Accordingly, the Union proposes a DOPT on or subsequent to August 17, 2002 in order to extend the PBGC's guaranty to the shut-down benefits provided in the RESI Plan and Union Plan.

The Court's standards

As a threshold issue, the Court readily adopts the unassailable statutory construction advanced by *Heppenstall* and its progeny that compels the Court to utilize the factors presented in 29 U.S.C. § 1342(c) as the foundation of its DOPT inquiry. The Court further adopts the well-reasoned three-part analysis set forth in *Heppenstall* as the means to protect the interests of the participants and PBGC as required by 29 U.S.C. § 1342(c).

Additionally, the Court concurs in the foregoing authorities' characterization of the interests of the participants and PBGC relevant to the DOPT analysis. It is axiomatic that

the participants' interests arise from their continued expectation and reliance on the accrual of vested pension benefits. *See Mize*, 987 F.2d at 1064 ("If extinguishing the employees' reliance interest is all that it takes to set a termination date, there would appear to be little or no incentive to follow the notice procedures in [section] 1342"); *Heppenstall*, 633 F.2d at 301 (determining that a participants' interest in vested pension benefits was an "expectation or reliance interest" and that no participant had a "justifiable expectation in a termination date later than May 31, 1979 when the employer ceased all operations."). On the other hand, "PBGC's interest as a self-financing mutual insurer is to protect its fund and other plans that pay into the fund in the form of termination premiums." *Mize*, 987 F.2d at 1062. *Accord Pension Comm. For Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. Pension Benefit Guaranty Corp.*, 991 F.2d 1415, 1419 (8th Cir.1993) ("The PBGC's liability is based on benefits an employee accrues during the viability of the pension plan. The longer a doomed plan exists, the more benefits qualified participants acquire, and, additional employees may become eligible for benefits."); *Heppenstall*, 633 F.2d at 297 (explaining the various ways in which PBGC's exposure depends on the termination date).

The facts of the instant case compel the Court to proceed cautiously before extending the *Heppenstall* analysis to the simplified two-part criteria espoused by *Broadway Maintenance* and *Mize*. Each of the foregoing authorities confronted scenarios where the participants' interests were in traditional pension benefits (i.e. where vesting was contingent on a combination of age and time of service at the time of retirement). The underlying rationale of these decisions is that the participants' reliance interests extinguished when they received notice that PBGC intended to terminate the defined benefit plans. Simply, the courts equated PBGC's notice of termination with the panoply of other factors (i.e. the participant's discharge prior to vesting, the participant's

death prior to vesting, etc.) that a participant could have reasonably expected to terminate his/her accrual of pension benefits.

There is little dispute that the two-part *Broadway Maintenance* criteria adequately serves the interests of the participants and PBGC in the traditional benefits setting. However, the benefits giving rise to the instant dispute over the DOPT the shut-down benefits provided in the RESI Plan and Union Plan—pose several difficulties that render the two-part test inadequate to an analysis of those plans.

The first difficulty arises from the RESI Plan and Union Plan participants' heightened reliance on shut-down benefits. Shut-down benefits share a timing element with traditional pension benefits; however, they are contingent on the shut-down of participant's place of employment. Unlike other benefits subject to contingent events (i.e. physical disability benefits), shut-down benefits are inextricably intertwined to the financial well-being of the employer. This contingency is of acute significance in the involuntary termination setting because the factor most likely to give rise to the vesting of shut-down benefits—the financial collapse of the employer—is invariably the event that will give rise to an involuntary termination of the participants' defined benefit plan. *See* (Pl.'s Mem. in Supp., Ex. # 1 attached thereto ("2001 Annual Report") at 9 (stating that "[i]n most cases termination was necessary because the sponsoring employer had gone out of business")). Therefore, participants that have fulfilled the timing component of shut-down benefits (i.e. those participants having the requisite combination of age and years of continuous service under the Rule of 65 or 70/80 plans) may reasonably rely that their benefits will vest, even in the event of a plan termination, because it is highly likely that the termination will arise from the employer's cessation of operations.

The Court need not rely, however, exclusively on the general nature of shut- down benefits and the common cause of involuntary terminations to demonstrate the strong reliance interests that the RESI Plan and Union Plan participants maintain in shut-down benefits. The facts demonstrate that the participants, through their collective-bargaining representative, negotiated in 1998 and 1999 to continue the shut-down benefits provided in the Union Plan and to extend such benefits to participants of the RESI Plan. Following RTI's initiation of Chapter 11 proceedings in April, 2001, the Union and RTI negotiated the MLA that provided if RTI did not satisfy the restructuring conditions on or before May 31, 2002, all parties agreed that RTI would begin to liquidate its assets. When RTI did not satisfy the restructuring conditions by May 31, 2002, the Union entered into the Shut-down Agreement with RTI in an effort to ensure the vesting of shut-down benefits. At that time, those participants that had satisfied the timing component of "70/80" or "Rule of 65" shut-down benefits had a reasonable expectation as to the vesting of those shut-down benefits—subject only to the Bankruptcy Court's approval of the sale to Newco. The relative strength of this reliance interest greatly exceeds the interests in the traditional pension benefits present in *Broadway Maintenance* and *Mize*. Consequently, PBGC's issuance of the NODs did not presumptively terminate the participants' reliance interests in the shut-down benefits.

The Court does not suggest, however, that the participants' interests in shut-down benefits preclude PBGC from proposing a DOPT that prevents such benefits from vesting. The Court determines only that the unique nature of shut-down benefits, coupled with the facts presented herein, require the Court to weigh the relative strength of the interests in shut-down benefits in proportion to the interests of PBGC—rather than to defer to the date PBGC issued the NODs.

The Court next turns to the level of deference that it must afford to PBGC's stated interests. The *Heppenstall* court cautioned against deferring to PBGC's proposed DOPT:

> [T]he statutory scheme relegates resolution of disputes over termination to the court in the first instance, not to PBGC. As an insurer in what is essentially a mutual insurance company [PBGC's] obvious interest is to protect the fund and premium payors. Congress determined that in the absence of agreement between PBGC and a plan administrator the court would protect participants from overly cautious use of the involuntary termination of the insurance scheme.

Heppenstall, 633 F.2d at 301. Nevertheless, as the agency entrusted to administer involuntary plan terminations, the Court must afford some level deference to PBGC's assessment of its best interests. *See Mize*, 987 F.2d at 1063 ("PBGC's interests should be deemed to be best served by the date proposed by PBGC.").

General principles of administrative law require the Court to afford PBGC's proposed DOPT a "fair measure of deference" limited by "the persuasiveness of the agency's position."[12] *See United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Accordingly, the Court must examine the administrative record in an effort to evaluate PBGC's decision.

An examination of the administrative record supporting PBGC's selection of the DOPT reveals several problematic omissions with regard to the RESI Plan and Union Plan. It is undisputed that PBGC stands to incur an additional $96 million in unfunded guaranteed benefits in the event that it is required to guarantee the shut-down benefits. *See* (A.R.17). It is beyond peradventure that the assumption of this level of

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[12] PBGC similarly proposes that the Court must accord "considerable deference" to its proposed DOPT. *See* (Pl's. Mem. in Opp'n at 22-23).

unfunded liability shut-down benefits will increase the liability of the PBGC insurance fund. However, 29 U.S.C. § 1342(c) provides that the interest of PBGC in termination proceedings is to protect the insurance fund from "any *unreasonable* increase." 29 U.S.C. § 1342(c) (emphasis added). While the statute does not define what constitutes an "unreasonable" increase, other provisions of PBGC's enabling act provide guidance. For instance, 29 U.S.C. § 1302(a)(3) charges PBGC with the duty "to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter." 29 U.S.C. § 1302(a)(3).

An examination of the approximately 3,000-pages of the administrative record reveals a lack of any consideration by the PBGC regarding the effect of the RESI Plan and Union Plan terminations on premiums. Similarly, there is a paucity of evidence in the record regarding the impact of the terminations on the overall stability of the PBGC insurance fund. These omissions are of particular import because at the time PBGC rendered the termination decisions, its most recent annual report declared a surplus of approximately $ 7.7 billion. *See* (2001 Annual Report at 4). Consequently, the lack of any consideration in the record regarding the potential impact of extending PBGC's guaranty to the shut-down benefits precludes the Court from affording the PBGC's a fair amount of deference.

PBGC attempts to overcome the deficiencies in record by demonstrating that its 2002 Annual Report reflects a deficit of approximately $3.6 billion. *See* (2002 Annual Report at 6). While the Court acknowledges the significant liability assumed by PBGC in the year 2002, PBGC's efforts emphasize the precise reason as to why the record must be complete in order to obtain deference from the Court. Simply, any foray

by the Court into PGBC's rationales for attempting to prevent the vesting of the shut-down benefits in relation to overall impact on the fund is an exercise in speculation.

In light of the deficiencies in the record, the Court finds that PBGC has failed to demonstrate that a DOPT of June 14, 2002 adequately protects the PBGC insurance fund from an unreasonable increase in liability. In contrast, the significant reliance interests of the RESI Plan and Union Plan participants in shut-down benefits compel the Court's selection of a DOPT of August 17, 2002.

Furthermore, the Court concludes that the participants in the Salaried Plan and B & L Plan maintained reliance interests comparable to the participants in *Broadway Maintenance* and *Mize*. Accordingly, the date PBGC issued the NODs regarding the termination of those plans—June 14, 2002—is the appropriate DOPT.

IV. CONCLUSION

Accordingly, the Court hereby orders: (1) the Motion of the United Steelworkers of America for Partial Summary Judgment Establishing the Date of Plan Termination (Dkt. # 52) is GRANTED IN PART and DENIED IN PART; (2) the Motion of Pension Benefit Guaranty Corporation for Summary Judgment (Dkt.# 54) is GRANTED IN PART and DENIED IN PART; and (3) Republic Technologies International, LLC's Motion for Interim Appointment of Trustee (Dkt.# 64) is DENIED AS MOOT.

IT IS SO ORDERED.

JUDGMENT

This matter is before the Court upon the following three motions: (1) the Motion of the United Steelworkers of America for Partial Summary Judgment Establishing the Date of Plan Termination (Dkt.# 52); (2) the Motion of Pension Benefit Guaranty Corporation for Summary Judgment (Dkt.

54); and (3) Republic Technologies International, LLC's Motion for Interim Appointment of Trustee (Dkt.# 64).

For the reasons set forth in the Memorandum Opinion and Order issued contemporaneously herewith, and incorporated herein by reference, it is the JUDGMENT of the Court that the following Plans are TERMINATED pursuant to 29 U.S.C. § 1342(c): (1) the RESI Plan; (2) the Union Plan; (3) the Salaried Plan; and (4) the B & L Plan. Additionally, it is the JUDGMENT of the Court that PBGC is APPOINTED statutory trustee pursuant to 29 U.S.C. § 1342(c), (d), and shall have all powers afforded to the trustee afforded by ERISA with respect to the following plans: (1) the RESI Plan; (2) the Union Plan; (3) the Salaried Plan; and (4) the B & L Plan. Finally, it is the JUDGMENT of the Court that the date of plan termination for the RESI Plan and the Union Plan shall be August 17, 2002; and the date of plan termination for the Salaried Plan and B & L Plan shall be June 14, 2002.

IT IS SO ORDERED.

APPENDIX C

STATUTES INVOLVED

29 U.S.C. § 1322. Single-employer plan benefits guaranteed

(a) Nonforfeitable benefits

Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a single-employer plan which terminates at a time when this subchapter applies to it.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer

plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee

(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application

for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(3)[1] In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

29 U.S.C. § 1348. Termination date

(a) For purposes of this subchapter the termination date of a single-employer plan is—

> (1) in the case of a plan terminated in a standard termination in accordance with the provisions of section 1341(b) of this title, the termination date proposed in the notice provided under section 1341(a)(2) of this title,

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[1] So in original. No pars. (1) and (2) have been designated.

(2) in the case of a plan terminated in a distress termination in accordance with the provisions of section 1341(c) of this title, the date established by the plan administrator and agreed to by the corporation,

(3) in the case of a plan terminated in accordance with the provisions of section 1342 of this title, the date established by the corporation and agreed to by the plan administrator, or

(4) in the case of a plan terminated under section 1341(c) or 1342 of this title in any case in which no agreement is reached between the plan administrator and the corporation (or the trustee), the date established by the court.

(b) For purposes of this subchapter, the date of termination of a multiemployer plan is—

(1) in the case of a plan terminated in accordance with the provisions of section 1341a of this title, the date determined under subsection (b) of that section; or

(2) in the case of a plan terminated in accordance with the provisions of section 1342 of this title, the date agreed to between the plan administrator and the corporation (or the trustee appointed under section 1342(b)(2) of this title, if any), or, if no agreement is reached, the date established by the court.

APPENDIX D

NEWSPAPER PROOF
FOR THE NOTICES OF DETERMINATION
FOR THE UNION PLANS

ATTENTION ALL PARTICIPANTS, RETIREES AND BENEFICIARIES OF THE REPUBLIC TECHNOLOGIES INTERNATIONAL, LLC USWA DEFINED BENEFIT PLAN AND THE REPUBLIC TECHNOLOGIES INTERNATIONAL, LLC PENSION PLAN FOR UNION ELIGIBLE EMPLOYEES AT THE LORAIN FACILITY

NOTICE OF DETERMINATION

PLEASE TAKE NOTICE that the Pension Benefit Guaranty Corporation ("PBGC") has determined, pursuant to Section 4042(a)(2), (4) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1342(a)(2), (4), that the Republic Technologies International, LLC-USWA Defined Benefit Plan and the Republic Technologies International, LLC Pension Plan for Union Eligible Employees at the Lorain Facility, sponsored by Republic Technologies International, LLC (the "Plans"), that the Plans will be unable to pay benefits when due, and that the possible long-run loss of the PBGC with respect to the Plans may reasonably be expected to increase unreasonably if the Plans are not terminated. The PBGC has further determined, pursuant to ERISA § 4042(c), 29 U.S.C. §1342(c), that the Plans must be terminated in order to avoid an unreasonable increase in the liability of the PBGC insurance fund and in order to protect the interests of the Plans' participants. Accordingly, PBGC intends to proceed pursuant to ERISA § 4042, 29 U.S.C. § 1342, to have the Plans terminated and PBGC appointed as statutory trustee, and pursuant to ERISA § 4048, 29 U.S.C. § 1348, to have June 14, 2002, established as the Plans' termination date.

PBGC has completed its decision making process in this matter; accordingly, this determination is effective on the date it is issued.

[LOGO]

STEVEN A. KANDARIAN
Executive Director
June 12, 2002

PENSION BENEFIT GUARANTY CORPORATION

(2)

No. 04-897

Supreme Court, U.S.
FILED
FEB 4 - 2005
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IN THE

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

When PBGC invokes its statutory right to seek termination of a pension plan in order to avoid an unreasonable increase in financial loss to the federal guaranty fund, and notice of the proposed termination is provided to plan participants, is it proper for the court to issue a decree that terminates the plan, and protects the PBGC guaranty fund, by fixing a termination date that is on or after the date that participants receive notice of the termination?

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IN THE

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No. 04-897

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Respondent Pension Benefit Guaranty Corporation ("PBGC") opposes the grant of a writ of certiorari in this case. Review is not warranted because there is no conflict among the five courts of appeals that have set out the test for establishing a date of plan termination under 29 U.S.C. § 1348(a)(4), there is no conflict between the decisions of those courts of appeals and any decision of this Court, and there is no important question of federal law that should be settled by this Court. Supreme Court Rule 10(a), (c).

STATEMENT OF THE CASE

A. Statement of Facts

PBGC is the federal agency established by the Employment Retirement Income Security Act of 1974 ("ERISA") *as*

amended, 29 U.S.C. §§ 1301-1461 (2000 and Supp. I 2001), to administer the nation's pension plan termination insurance program. *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990). PBGC receives no money from the United States Treasury, and the United States "is not liable for any obligation or liability incurred by [PBGC]." 29 U.S.C. § 1302(g)(2). PBGC has only three sources from which it can fund guaranteed benefits: premiums paid by employers who sponsor defined benefit plans, assets and asset earnings of terminated plans, and statutory liability paid by employers that sponsored terminated plans. 29 U.S.C. §§ 1305-1307, 1362.[1]

In recent years, PBGC's single-employer pension plan termination insurance program has operated at a substantial deficit. For fiscal year 2004, PBGC estimated its deficit at $23.3 billion. PBGC 2004 Performance and Accountability Report (Nov. 15, 2004) at 13 (available at www.pbgc.gov/publications/annrpt/PAR1104.pdf). This deficit has grown from $3.6 billion and $11.2 billion for fiscal years 2002 and 2003, respectively, and contrasts with the $7.7 billion surplus that existed in fiscal year 2001. PBGC Pension Insurance Data Book, Table S-1 at 25 (available at www.pbgc.gov/publications/databook/databook03.pdf).

To protect the termination insurance program, ERISA allows PBGC to apply to a district court for an order terminating a pension plan if PBGC determines that its "possible long-run loss . . . with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4). The district court has authority under 29 U.S.C. § 1342(c) to terminate the plan, *inter alia*, to avoid "any unreasonable increase in the liability" of

[1] PBGC has independent litigating authority based on its power "to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." 29 U.S.C. § 1302(b)(1). *See also LTV*, 496 U.S. at 635-36.

PBGC's insurance fund. In the event that PBGC and the employer are unable to agree on a date of plan termination, the date is established by the court. 29 U.S.C. § 1348(a)(4).

In this case, PBGC sought to terminate four pension plans administered by a bankrupt steel manufacturer, Republic Technologies International, LLC ("RTI"). The two plans at issue here (the "Union Plans") cover participants represented by petitioner United Steelworkers of America ("USWA"). Pet. App. at 6a.

The Union Plans included "shutdown benefits." *Id.* Shutdown benefits are enhanced early retirement benefits that are contingent on the permanent closing of an employer's facility. Shutdown benefits provide eligible participants with their full, actuarially unreduced benefits that they otherwise would receive only at 65 years of age. Eligible participants can begin receiving shutdown benefits as early as age 45. *See id.* at 7a. An employer can promise shutdown benefits at any time. However, an employer is not required to fund shutdown benefits, or pay any premiums to PBGC for them, until a permanent shutdown occurs. *Id.* at 6a. When shutdown benefits become nonforfeitable immediately before the date of plan termination, the employer is *never* required to fund them and is *never* required to pay premiums to PBGC for those benefits. Thus, "the cost of shutdown benefits can be very high." *Id.* at 7a.

In April 2001, RTI filed a petition for bankruptcy protection. *Id.* at 8a. After that filing, RTI continued its operations, retained its USWA-represented workers, and honored the terms of the existing bargaining agreements. The company did, however, stop paying its statutorily-mandated contributions to its four pension plans. In December 2001, RTI and USWA signed a modified labor agreement which specified that if RTI did not file a plan of reorganization by May 31, 2002, the company would be compelled to sell its assets to a purchaser who would commit itself to signing on to the terms

of the USWA labor agreement. *Id.* at 26a-27a. The company eventually located an asset purchaser, Newco, that was willing to sign the modified USWA labor agreement. *Id.* at 8a. But Newco refused to assume responsibility for any of RTI's pension plans. *Id.*

Because RTI could not fund the pension plans, and Newco would not fund them, it became apparent that the plans would eventually terminate. However, USWA wished to obtain shutdown benefits for its members, even though RTI's plants would not actually cease operations and many RTI employees would simply go to work for Newco. To that end, USWA negotiated a letter agreement in which RTI promised that all of RTI's facilities covered by the USWA agreement would be "declared" to have incurred a permanent shutdown, regardless of whether the plants remained in operation. *Id.* Through this device, it was anticipated that workers employed by Newco could be deemed entitled to early retirement benefits from the Union Plans, which would then be paid by PBGC after plan termination. The Newco sale, in turn, was conditioned on bankruptcy court approval of the letter agreement. *Id.* On May 31, 2002, the bankruptcy court scheduled a hearing to approve the asset sale and the letter agreement for July 9, 2002. *Id.*

PBGC concluded that if it were required to pay shutdown benefits in the Union Plans, its long-run loss could reasonably be expected to increase unreasonably. 29 U.S.C. §§ 1342(a)(4), (c). Shutdown benefits in the Union Plans would add $95 million in unfunded benefits that PBGC could be required to guarantee. This would be in addition to the more than $100 million in existing unfunded benefits PBGC was already required to pay. On June 14, 2002, PBGC initiated proceedings in the United States District Court for the Northern District of Ohio to terminate the Union Plans under 29 U.S.C. §§ 1342(a)(2), (4) and (c) to prevent any unreasonable increase in the liability of the PBGC insurance

fund. Pet. App. at 9a-10a. On the same day, PBGC gave notice of its intention to seek termination of the Union Plans to the Plan Administrator and to USWA, and also published its notice in national and local newspapers where RTI's facilities were located. *Id.* The notice stated that the Union Plans would terminate as of June 14, 2002. *Id.* at 52a. On July 11, 2002, the bankruptcy court approved the sale of RTI's assets and the letter agreement, without prejudice to PBGC's rights in the termination action. *Id.* at 14a-15a.

B. District Court Decision

The district court upheld PBGC's decision to terminate all four of RTI's pension plans. Pet. App. at 32a. It reviewed PBGC's extensive administrative record and found that PBGC's decision to terminate the Union Plans was not arbitrary or capricious. *Id.* at 35a. The district court concluded that it would "defer to the PBGC's determinations that the [Union Plans] must be terminated to prevent any unreasonable increase in the liability of the PBGC insurance fund." *Id.*

The district court accepted PBGC's proposed date of plan termination, June 14, 2002, for the two non-union plans, neither of which contained shutdown benefits. *Id.* at 45a. However, with respect to the Union Plans, the district court found that the same notice that extinguished participants' reliance interest in other pension benefits did not extinguish participants' interest in shutdown benefits. *Id.* at 41a-42a. Citing PBGC's $7.7 billion surplus as of the end of fiscal year 2001, the court refused to defer to PBGC's determination of its financial interest in setting the termination date. *Id.* at 44a. Consequently, the district court selected August 17, 2002, one day after the "declared" shutdown, as the date of plan termination of the Union Plans. *Id.* at 45a.

C. Court of Appeals Decision

The court of appeals reversed. Following the decisions of four other circuits, the court held that the "most appropriate factors for us to focus on" in selecting a termination date are the expectations of participants and the financial implications of the termination for PBGC. Pet. App. at 11a-12a. The court rejected the district court's conclusion that participants' reliance interest in shutdown benefits remains "strong" even after "they receive notice from PBGC that the plan is about to be terminated at a date prior to the vesting of those benefits." *Id.* at 13a. Instead, the court concluded that the requirement of notice is sufficient to extinguish participants' interests in shutdown benefits to the same extent as any other type of pension benefit. The court of appeals also noted that bankruptcy court approval for the shutdown agreement was not given until "almost one month *after* PBGC issued the notices of termination," *id.* at 14a (emphasis in original), preventing participants from developing any heightened reliance interest in benefits that were contingent upon that approval.

The court of appeals held that the district court "failed to give appropriate deference to PBGC's conclusion that it faced an unreasonable increase in its liabilities if the court selected a termination date after 'shutdown.'" *Id.* at 15a. The court rejected the district court's assertion that PBGC failed to consider the impact of the shutdown benefits on the insurance fund as a whole, reasoning that PBGC is expressly authorized to terminate a plan when "the possible long-run loss of [PBGC] *with respect to the plan* may reasonably be expected to increase unreasonably if the plan is not terminated." *Id.* (citing 29 U.S.C. § 1342(a)(4)) (emphasis in original). Consequently, the court concluded that June 14, 2002, the date on which participants' reliance interests were extinguished by notice, and the date PBGC had proposed, was the appropriate date of termination for the Union Plans. *Id.* at 16a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ABOUT THE TEST FOR ESTABLISHING A DATE OF TERMINATION.

The decision of the court of appeals is entirely consistent with the decisions of the four other courts of appeals that have interpreted 29 U.S.C. § 1348(a)(4) over the past quarter century. Every court of appeals that has considered the question has held that a date of plan termination is determined by applying a two-step test. First, the court looks to the earliest date on which plan participants receive actual or constructive notice that the pension plan will be terminated. Once participants receive notice of plan termination they can no longer justifiably rely on the vesting or accrual of any additional benefits. Second, the court selects the date on or after such notice that will best protect PBGC's financial interests. Pet. App. at 11a-12a, 16a; *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. PBGC*, 991 F.2d 1415, 1419 (8th Cir.1993); *PBGC v. Mize Co.*, 987 F.2d 1059, 1062-63 (4th Cir. 1993); *PBGC v. Broadway Maint. Corp. (In re Pension Plan for Employees of Broadway Maint. Corp.)*, 707 F.2d 647, 652-53 (2d Cir. 1983); *United Steelworkers of Am. v. Harris & Sons Steel Corp.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *PBGC v. DiCenso (In re Syntex Fabrics, Inc. Pension Plan)*, 698 F.2d 199, 201 (3d Cir. 1980); *PBGC v. Heppenstall Co.*, 633 F.2d 293, 300-02 (3d Cir. 1980). Recognizing that PBGC is the best judge of its financial interests, every circuit that has considered the question has deferred in this second step to PBGC's analysis of what termination date best serves the financial well-being of the insurance fund. Pet. App. at 15a; *Farmstead*, 991 F.2d at 1419; *Mize*, 987 F.2d at 1062-63; *Broadway Maint.*, 707 F.2d at 652; *Harris & Sons*, 706 F.2d at 1296.

The court of appeals' decision in this case is consistent with this long-standing and uniform precedent. Indeed, the

decision expressly states that it follows the two leading decisions in *Broadway Maintenance* and *Heppenstall* on the proper test to be used in establishing a date of plan termination. Pet. App. at 11a-12a, 16a. Thus, there is no conflict in the circuits.

II. THE COURT OF APPEALS' DECISION IS LEGALLY SOUND.

A. The Test Used by the Courts of Appeals Gives Full Effect to the Relevant Factors Identified in ERISA.

The two-step test the courts of appeals have embraced gives effect to the statutory criteria identified by Congress to involuntarily terminate a pension plan. ERISA "provides for involuntary termination proceedings 'to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.'" Pet. App. at 11a-12a (quoting 29 U.S.C. § 1342(c)); *see also* 29 U.S.C. § 1342(a)(4) (authorizing PBGC to seek involuntary termination of a pension plan where "the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.").

Under the two-step test, participants' interests in the continued vesting and accrual of benefits are fully protected, and given primary weight, until the date on which they have notice that the plan will be terminated. However, as the court of appeals found, "Every court to consider the issue has held that expectation interests in the accrual of benefits are extinguished on the date that participants receive reasonable notice from PBGC that the plan is going to be terminated." Pet. App. at 14a.

USWA argues that notice does not extinguish participants' expectation interests in shutdown benefits because shutdown benefits have allegedly unique characteristics that distinguish

them from other types of benefits. Pet. at 10-13. This is an artificial distinction. No court selecting a termination date has ever found a basis for distinguishing between forms of benefits, or held that some types of benefits inherently come with stronger reliance interests than others.

ERISA makes no distinction between various forms of benefits for the purposes of plan termination. PBGC guarantees only those benefits that are "nonforfeitable" as of the date of plan termination.[2] 29 U.S.C. § 1322(a). In this case, USWA concedes that the shutdown benefits in the Union Plans were forfeitable on June 14, 2002, PBGC's proposed date of plan termination and the date PBGC gave notice of termination to participants. Pet. at 11, 17. USWA further concedes that the PBGC guarantee would extend to shutdown benefits only "[i]f a shutdown occurs before the date of plan termination." *Id.* at 11; *see also id.* at 17. Here, there was no real or declared shutdown on or before June 14, 2002.

The second factor the court of appeals considered—PBGC's financial interests—reflects the statutory language authorizing PBGC to terminate a plan to avoid an unreasonable increase in the liability of the insurance fund. 29 U.S.C. §1342(c). As the court of appeals recognized, "ERISA provides for involuntary termination proceedings precisely so that PBGC can protect its own financial interests . . . ." Pet. App. at 16a; *see also Farmstead*, 991 F.2d at 1420-21; *Mize*, 987 F.2d at 1062-63; *Broadway Maintenance*, 707 F.2d at 652-53; *Harris & Sons*, 706 F.2d at 1296. In this case, PBGC's financial interests were clear. PBGC sought to protect the insurance fund from an increase of about $95 million in guaranteed benefits—in addition to the $100 million in guaranteed benefits PBGC was already obligated to pay the

[2] A "nonforfeitable benefit" is a benefit for which the participant has satisfied the conditions for entitlement under ERISA and the terms of the plan, other than submission of a formal application, retirement, or completion of a required waiting period. 29 U.S.C. § 1301(a)(8).

Union Plan participants—if shutdown benefits became non-forfeitable. Pet. App. at 1a, 15a.

The court of appeals was well aware that selection of a termination date that would cause the very loss PBGC sought to prevent could eviscerate the involuntary plan termination provisions of ERISA. *Id.* at 15a-16a. By selecting a termination date that occurs once participants have notice, but before PBGC is obligated to guarantee an additional $95 million in unfunded shutdown benefits, the court of appeals respected the balance between the statutory interests at stake: "[I]n reversing the district court's selection of a termination date, we not only adhere to the statutory scheme of ERISA and follow *Broadway Maintenance* and *Heppenstall*, but also safeguard this insurance system for the benefit of future employees while at the same time honoring the expectations of the plans' participants as much as possible." *Id.* at 16a.

B. There Is No Unambiguous Provision of ERISA That Compels PBGC to Guarantee Shutdown Benefits.

USWA commences its argument by quoting the maxim that if a statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). This truism is followed by the announcement that PBGC—and, by implication, every court that has ever reviewed a PBGC termination action—has interpreted 29 U.S.C. § 1348(a)(4) "in a manner that is inconsistent with the agency's obligation to guarantee shutdown benefits." Pet. at 11.

Nothing could be further from the truth. Courts have uniformly concluded that 29 U.S.C. § 1348(a)(4) "does not provide specific guidance on what factors the court should use when making its selection [of a termination date]." Pet.

App. at 11a; *accord Farmstead*, 991 F.2d at 1419; *Mize*, 987 F.2d at 1062, *Heppenstall*, 633 F.2d at 297 ("Nowhere in the statute . . . is there any specific standard for the court's guidance in selecting a date."). The statute is utterly silent as to *how* a court should set a termination date; it merely provides that in a case where the PBGC and plan administrator cannot agree on a date, "the termination date of a single-employer plan is . . . the date established by the court." 29 U.S.C. § 1348(a)(4).

Nothing in section 1348(a)(4) supports USWA's policy argument that PBGC must subordinate the financial solvency of the insurance fund in order to maximize the financial interests of participants in a particular plan. To the contrary, PBGC has a duty to the 44 million participants in other insured plans to keep the insurance program viable. Pet. App. at 16a; *see also PBGC v. Pension Comm. of Pan Am. World Airways, Inc. (In re Pan Am. World Airways, Inc. Coop. Ret. Inc. Plan)*, 777 F. Supp. 1179, 1183 (S.D.N.Y. 1991), *aff'd mem.*, 970 F.2d 896 (2d Cir. 1992) ("the PBGC fund must be available to protect the minimally guaranteed benefits of the beneficiaries of all covered plans in the United States . . . .").

Indeed, since the term "shutdown benefits" is nowhere mentioned in ERISA, one can hardly say that PBGC or the court of appeals violated an unambiguous or unequivocal statutory command. USWA attempts to create such a command by looking to 29 U.S.C. § 1302(a), which recites the three broad general purposes of Title IV. 29 U.S.C. §§ 1302(a)(1)-(3). However, this provision does not speak at all to the factors a court should consider in establishing a plan termination date. Even if it did, this provision is silent as to how these statutory purposes should be balanced.

USWA's reading of the statute would not balance these purposes, but would subordinate the third purpose, "to maintain premiums . . . at the lowest level consistent with carrying out [PBGC's statutory] obligations . . . ," 29 U.S.C.

§ 1302(a)(3), to the boundless expectations of plan participants in additional benefit accruals. Nothing in ERISA, however, suggests such a reading is required by the statute or is preferable to the court of appeals' test, which accommodates both plan participants' reasonable interests and the long-term fiscal health of the PBGC. As this Court observed, "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *LTV*, 496 U.S. at 647, *quoting Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

USWA further asserts that because Congress denied PBGC's request in 1994 to limit the agency's liability for shutdown benefits, Congress intended PBGC to guarantee those benefits and to refrain from involuntarily terminating a pension plan until after the shutdown occurs. Pet. at 12. USWA reads far too much into this congressional inaction. Congress may well have concluded that the existing statutory framework already provided PBGC with adequate means to avoid liability for shutdown benefits. Indeed, in a case involving another provision of Title IV, this Court reasoned: "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *LTV*, 496 U.S. at 649-50 (internal citations omitted). *See also, e.g., United States v. Craft*, 535 U.S. 274, 287 (2002); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). The situation that existed in *LTV* is present here as well, and the Court should draw no inferences from Congress's failure to enact legislation more than 10 years ago.

C. The Court of Appeals Did Not Abdicate Its Responsibility to Establish the Date of Plan Termination.

USWA contends that by deferring to PBGC's identification of its financial interests, the court of appeals unlawfully abdicated its judicial role in violation of the separation of powers doctrine. Pet. at 14-16. USWA's argument is factually and legally inaccurate.

Contrary to USWA's claim, the court of appeals expressly acknowledged its statutory responsibility to set a termination date: "[D]espite the importance of termination dates, ERISA does not give PBGC unilateral authority to set them, even in involuntary proceedings. If the plan administrator does not agree with the date proposed by PBGC in an involuntary proceeding, a federal district court sets the date of plan termination." Pet. App. at 6a. Nor does the test established in *Heppenstall* and *Broadway Maintenance* and adopted by the court of appeals here delegate the court's judicial responsibility to PBGC. A court performs many functions in determining an appropriate date of plan termination. First, under the Administrative Procedure Act, 5 U.S.C. § 706(2), the court scrutinizes PBGC's grounds for terminating the plan under 29 U.S.C. §§ 1342(a) and (c). Second, the court must ensure that participants have received notice of plan termination.[3] Third, the court must identify the date on which such notice was provided. Finally, a court must review, with appropriate deference, PBGC's explanation of why it has chosen a particular termination date on or after the date participants receive notice.

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[3] Notice does not exclusively come from PBGC. It could come from facts giving rise to constructive notice, such as the cessation of the employer's operations and dismissal of all of its employees. Of course, notice cannot retroactively extinguish benefits that are already vested and accrued. *Heppenstall*, 633 F.2d at 302; *PBGC v. Maryland Glass Corp.*, 618 F. Supp. 1410, 1415 (D. Md. 1985), *aff'd mem.*, 814 F.2d 655 (4th Cir. 1987).

It is entirely appropriate that a court defer to PBGC's evaluation of the insurance fund's financial interest as PBGC is best situated to make that determination. Pet. App. at 15a-16a. The courts of appeals have thus uniformly held that "PBGC's interests should be deemed to be best served by the date proposed by PBGC" and that "PBGC's interests should be deferred to, at least to the extent of determining its own best interests." Pet. App. at 15a, *citing Mize*, 987 F.2d at 1063; *see also Farmstead*, 991 F.2d at 1419; *Broadway Maint.*, 707 F.2d at 653; *Harris & Sons*, 706 F.2d at 1296.[4]

In these circumstances, there is no separation of powers concern. *See* Pet. at 14-16. This Court has consistently rejected arguments that judicial deference to administrative expertise is inconsistent with the separation of powers. *See generally Chevron*, 467 U.S. at 866. As this Court recently stated, "Deference is not abdication." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment). Indeed, this Court has regularly given deference to PBGC's interpretations of Title IV of ERISA.[5]

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[4] USWA incorrectly cites *Pan Am* for the proposition that PBGC is not entitled to deference when it selects a date of plan termination to protect its interests. Pet. at 16. The *Pan Am* court established as the date of plan termination the date on which it found that participants reasonably should have known about PBGC's newspaper publication of its notice of termination. *Pan Am.*, 777 F. Supp. at 1185. Here, unlike in *Pan Am*, the date of plan termination selected by the district court caused the very loss PBGC sought to prevent.

[5] *See LTV*, 496 U.S. at 651 ("[T]he judgments about the way the real world works that have gone into the PBGC's . . . policy are precisely the kind that agencies are better equipped to make than courts."); *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) ("For a court to attempt to answer . . . questions [about ERISA] without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" (internal citation omitted)); *Nachman Corp. v. PBGC*, 446

D. The Court of Appeals' Interpretation of 29 U.S.C. § 1348(a)(4) Is Consistent With Other Provisions of Title IV of ERISA.

USWA argues that the court of appeals' application of the test established by *Broadway Maintenance* and *Heppenstall* renders 29 U.S.C. §§ 1322(a) and 1348(a) superfluous because PBGC can always seek a date of plan termination prior to the date that shutdown benefits become nonforfeitable, and courts must defer to PBGC's choice of termination date. Pet. at 16-18.[6] USWA's contention that PBGC has a universal obligation to guarantee shutdown benefits completely disregards ERISA's plan termination provisions that are designed to protect against unreasonable increases in the PBGC insurance fund's liabilities. *See* 29 U.S.C. §§ 1342(a)(4) and (c). Congress explicitly authorized PBGC to involuntarily terminate a pension plan whenever liability increases with respect to the plan were unreasonable. USWA's reading of the court's authority to set a termination date under 29 U.S.C. § 1348(a)(4) would render these important provisions superfluous. USWA's interpretation, which looks exclusively to maximize the interests of participants, would allow a court to determine that a plan must be terminated to prevent an unreasonable loss to the pension insurance system, but then set a date of plan termination that causes that very loss. The district court made this error, and the court of appeals quite properly corrected it.

U.S. 359, 373-74 (1980) (in reviewing PBGC's interpretation of nonforfeitable benefits under 29 U.S.C. § 1322(a), the Court stated, "We surely may not reject the contemporary construction of the statute by the PBGC without a careful examination of Title IV and its underiying legislative history to see what benefits Congress intended to insure.").

[6] USWA claims, "Unless PBGC is unaware that a shutdown is imminent, which is unlikely, PBGC always will publish a notice stating its intent to seek termination of the plan before the anticipated shutdown date." Pet. at 17. In fact, PBGC often does not learn about a shutdown until after it has occurred.

Likewise, the court of appeals' decision accords full meaning to 29 U.S.C. § 1322(a), which requires PBGC to guarantee "nonforfeitable" benefits. Pet. App. at 13a-16a. A benefit that has not accrued or vested as of the date of plan termination is by definition a "forfeitable" benefit. Under ERISA, forfeitable benefits are not guaranteed. 29 U.S.C. § 1322(a). As USWA concedes, when a plan termination date precedes the permanent shutdown of an employer's facility, shutdown benefits are not vested; rather, they are forfeitable, and therefore they are not guaranteed. Pet. at 11, 17. In this regard, shutdown benefits are no different from any other form of benefit where the participant has not met the conditions for entitlement that are a prerequisite to making the benefit nonforfeitable as of the date of plan termination.

III. USWA'S INTERPRETATION OF 29 U.S.C. § 1348(a)(4) WOULD HARM THE PENSION INSURANCE PROGRAM.

USWA's interpretation of 29 U.S.C. § 1348(a)(4), which would require PBGC to guarantee the payment of unfunded shutdown benefits, would seriously undermine the agency's mission as the insurer of last resort. There is no question that in this case alone a date of plan termination after the "declared" shutdown could nearly double PBGC's loss by adding almost $100 million to PBGC's liabilities. Pet. at 6, 9, 15. If PBGC were required to guarantee payment of shutdown benefits for the entire universe of pension plans that contain such benefits, the financial impact of USWA's position would be staggering. As the record in this case demonstrates, when PBGC took action to terminate the Union Plans, PBGC was faced with the prospect of incurring up to $2.7 billion in additional losses if it were forced to assume the cost of shutdown benefits in the financially troubled steel industry alone. Admin. Rec. 2643.

The test for establishing termination dates urged by the USWA could also provide an incentive for private parties to

deliberately shift unfunded pension promises onto PBGC, a result that would jeopardize the pension insurance program and exacerbate the moral hazard. Here, the moral hazard is the very real risk that an employer covered by the federal insurance fund will obtain labor peace by promising benefits that the employer cannot afford, expecting PBGC to cover the difference.

That is precisely what happened in this case. Management and labor agreed among themselves to add millions of dollars in unfunded shutdown benefits and knowingly left PBGC to pick up the tab. Pet. at 5-6; Pet. App. at 7a-8a. Thus, the test urged by USWA would allow private parties to contract in such a manner as to dictate government operations, to the detriment of PBGC and premium-payers. This is exactly the type of moral hazard this Court has found unacceptable. *Nachman*, 446 U.S. at 367 n.12 ("employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise."); *see also LTV*, 496 U.S. at 642, 651-52.

The temptation for private parties to abuse the pension insurance system increases where, as here, the employer is not required to fund the promised benefits or pay PBGC insurance premiums to help cover the agency's increased risk of loss. If PBGC did not have the ability to seek a timely termination date to protect itself from this moral hazard, it would be forced to bear the resulting loss to the detriment of all participants and premium-payers in the insurance program. Especially given PBGC's tenuous financial position, with a deficit of over $23 billion, it can ill afford to bear such avoidable losses. The court of appeals' decision, which rejects USWA's interpretation in favor of a standard that balances the interests of participants, premium-payers, and PBGC, is best left undisturbed by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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